REPRINT OF COURT FILES.

Supreme Court of the United States.

WILLIAM H. ROBERTSON, Collector of the Port of New York,
Plaintiff in Error,

vs.

LOUIS A. SALOMON and CHARLES SALOMON.

No. 446 of October Term, 1888.

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Judd & Detweiler, Printers, Washington, D. C., December 21, 1893.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 446.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

LOUIS A. SALOMON AND CHARLES SALOMON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 446.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

LOUIS A. SALOMON AND CHARLES SALOMON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1887.

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1 UNITED STATES OF AMERICA, *88:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Louis A. Salomon & Charles Salomon, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened, to the great damage of the said William H. Robertson, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-six, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of September, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of U. S. Circuit Court, South. Dist. of New York.]

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.

WM. J. WALLACE.

2 [Endorsed:] 9449. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Louis A. Salomon & ano., defendants in error. Writ of error. Stephen A. Walker, attorney for plaintiff in error. U. S. circuit court. Filed Sep. 8, 1886. Timothy Griffith, clerk.

Service of a copy of the within writ of error is hereby admitted this 8 day of September, 1886.

TREMAIN & TYLER,
J. S. D.,
Attorneys for Def'ts in Error.

UNITED STATES OF AMERICA, *Southern District of New York,* } *88:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from

one to seventy-six, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William H. Robertson, plaintiff in error, against Louis A. Salomon & ano., defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[Seal of U. S. Circuit Court, South. Dist. of New York.]

TIMOTHY GRIFFITH, *Clerk.*

3 *Summons.*

The Superior Court of the City of New York.

LOUIS A. SALOMON and CHARLES SALOMON, Plaintiffs,
against
WILLIAM H. ROBERTSON, Collector of the Port of New York, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Nov. 17, 1884.

TREMAIN & TYLER,
Plaintiffs' Attorneys.

Office and post-office address: No. 167 Broadway, New York city.

4 (Endorsed:) New York superior court. Louis A. Salomon and Charles Salomon, plaintiffs, against William H. Robertson, collector of the port of New York, defendant. Summons. Tremain and Tyler, plaintiffs' attorneys. Office and post-office address, 167 B'dway, N. Y. city.

Service of a copy of the within summons is hereby admitted.
N. Y., Nov. 18, 1884.
(S'g'd) GEO. W. PALMER, *D. C.*

5 *Notice of Appearance and Demand.*

N. Y. Superior Court.

LOUIS A. SALOMON & ANO. *versus* WILLIAM H. ROBERTSON.

You will please take notice that I am retained by and appear as attorney for the defendant in this action, and demand service of a

bill of particulars of the plaintiffs' claim herein, and a copy of the complaint and all papers in this action, upon me, at my office in the United States court and post-office building, in the city of New York.

Yours, ELIHU ROOT,
United States Attorney, Attorney for Defendant.

New York, Dec. 4, 1884.

To Messrs. Tremain & Tyler, attorneys for plaintiffs.

6 [Endorsed:] 9449. N. Y. superior court. Louis A. Salomon & ano, *versus* William H. Robertson. Notice of appearance. Stephen A. Walker, United States attorney, attorney for defendant.

Due service of a copy of the within notice is hereby admitted. Dated the — day of ——, 188–.

——— ———,
Plaintiffs' Attorneys.

To Messrs. Tremain & Tyler, plaintiffs' attorneys.

7 SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York, }

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

To the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit:

William H. Robertson, petitioner and affiant, respectfully showeth that he was, prior to the commencement of the suit hereinafter referred to, collector of the customs for the port and district of the city of New York, duly appointed according to law, and that on or about the 18 day of November, 1884, a suit was commenced against him by Louis A. Salomon and Charles Salomon in the superior court of the city of New York for or on account of acts done by him under the revenue laws of the United States and as such collector, and that he has been served with process in said suit in said southern district, and that no trial has been had in said cause.

He therefore prays that, in pursuance of the act of Congress in such case made and provided, the said cause so commenced in the said superior court may be removed therefrom and entered on the docket of this honorable court and thereafter proceeded in as a cause originally commenced in this court.

And he will ever pray, etc.

And, being duly sworn, deposes and says that the matters hereinbefore set forth are true to the best of his knowledge, information, and belief.

(S'g'd) W. H. ROBERTSON.

Sworn to before me this 9th day of December, A. D. 1884.

(S'g'd) E. N. HELLEN,
Notary Public, County N. Y.

I certify that, as counsel for the petitioner, I have examined into the proceedings against him and have carefully inquired into all the matters set forth in the within petition and affidavit, and that I believe the same to be true.

New York, Dec. 10, 1884.

(S'g'd) ELIHU ROOT,
U. S. Attorney, Counsellor of the said Circuit Court.

8 [Endorsed:] 9449. U. S. circuit court. Louis A. Salomon & ano. — Wm. H. Robertson, collector of customs at the port of New York. Petition to remove cause. Elihu Root, United States attorney, attorney for defendant. U. S. circuit court. Filed Dec. 12, 1884. Timothy Griffith, clerk.

9 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Edward L. Hedden, defendant, by Louis A. Salomon & ano., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 17 day of December, 1884, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 12 day of December, in the year one thousand eight hundred and eighty-four.

[L. S.] (S'g'd) TIMOTHY GRIFFITH, *Clerk.*

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

10 [Endorsed:] 9449. U. S. circuit court. Louis H. Salomon & ano. *vs.* William H. Robertson. Certiorari. Elihu Root, U. S. attorney, attorney for defendant. *Elihu Root, United States attorney, attorney for defendant.* (File-mark:) U. S. circuit court. Filed Dec. 15, 1884. Timothy Griffith, clerk.

I hereby depute John E. Dowley to serve the within writ.

Dated December 12, 1884.

(S'g'd) JOEL B. ERHARDT,
U. S. Marshal.

I have this day personally served upon the clerk of the superior court of the city of New York a duplicate of the within writ, at the same time showing the original.

Dated Dec. 13th, 1884.

(S'g'd) JOEL B. ERHARDT,
U. S. Marshal.

Bill of Particulars of Merchandise Imported by —— ——.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
Beans	Trieste.	Teutonia...	Nov. 26, 1883	Jan. 15, 1884...	182 20	Jan. 15, 1884.. and April 28, 1884..	April 28, 1884.	April 28, 1884..	August 22, 1884
	Trieste.	Golden Horn	Feb. 13, 1884	March 21, 1884..	455 40	March 21, 1884.. and May 9, 1884...	May 9, 1884...	May 9, 1884....	August 22, 1884
	Trieste.	Guildford..	Nov. 15, 1883	Dec. 17, 1883...	273 20	Dec. 17, 1883.. and May, 1884.....	May 20, 1884..	May 20, 1884...	August 22, 1884

Plaintiffs' bill of particulars referred to in the foregoing complaint.
Dated New York, December 18th, 1884.
(S'g'd)

TREMAIN & TYLER,
Plaintiffs' Attorneys.

12 United States Circuit Court, Southern District of New York.

LOUIS A. SALOMON and CHARLES SALOMON, Pl'ffs,
against
WILLIAM H. ROBERTSON, Collector of the Port of New York, Def't. } No. 9449.

The above-named plaintiffs, for complaint in this action, state—

I. That the defendant during the times hereinafter mentioned was collector of the customs of the United States at the port of New York, and that the plaintiffs during said times were copartners in trade, doing business in New York and elsewhere under the firm name of L. A. Salomon & Brother, and in said business imported and entered at the port of New York certain merchandise at the times and by the vessels specified in the plaintiffs' bill of particulars, which is hereby made part of this complaint.

II. That the defendant, as such collector, exacted from plaintiffs, as and for duties on said merchandise, the sums specified in said bill of particulars, to wit, the sum of nine hundred and ten and $\frac{80}{100}$ dollars ($910.80) in excess of the amount required by law, and which said excessive sum the plaintiff, on or about the dates specified in the said bill of particulars, and in order to obtain possession of said goods, were compelled to pay and did pay to the defendant.

III. That plaintiffs filed with the said defendant due and timely protests in writing upon each and every entry of said goods against the decision exacting said duties, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

IV. That plaintiffs have made due and timely appeal in each case to the Secretary of the Treasury, whose decision on each appeal has either been rendered within ninety days previous to the beginning of this suit or has been delayed more than ninety days from the date of such appeal on each and every entry.

V. That the said bill of particulars states for each importation separately the date of entry at the custom-house, the precise amount of duty said to have been exacted in excess, the date of payment of said duty, and the filing of said protests, of the appeals to the Secretary of the Treasury and his decision thereon, if any, together with the other particulars required by law.

VI. That the sums so exacted as aforesaid have not been repaid to the plaintiffs and are still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for the sum of nine hundred and ten and $\frac{80}{100}$ dollars ($910.08), with interest thereon from the several dates of payment as they appear on said bill of particulars, together with the costs and disbursements of this action.

(S'g'd) TREMAIN & TYLER,
Plaintiffs' Attorneys.

Office and P. O. address: 167 Broadway, New York city.

13 [Endorsed:] No. 9449. U. S. circuit court, southern district of New York. Louis A. Salomon and ano'r, plaintiffs,

vs. William H. Robertson, collector of the port of New York, defendant. Complaint and bill of particulars. Tremain & Tyler, plaintiffs' attorneys, No. 167 Broadway, New York.

Due and timely service of a copy of the within complaint and bill of particulars is hereby admitted.
Dated New York, Dec. 24, 1885.
(S'g'd) ELIHU ROOT,
U. S. Attorney and Attorney for Defendant.

14 Circuit Court of the United States for the Southern District of New York.

LOUIS A. SALOMON and CHARLES SALOMON, Pl'ffs,
versus
WILLIAM H. ROBERTSON, Collector, etc. } No. 9449.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

15 IX. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs, as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant, in his official capacity aforesaid, to the United States and placed beyond his control.

X. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from plaintiffs to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the

plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

ELIHU ROOT,
United States Attorney, Attorney for the Defendant.

[Endorsed:] U. S. circuit court, southern district of New York. Louis A. Salomon & *als. vs.* W. H. Robertson, collector, etc. Answer. Elihu Root, United States attorney, attorney for defendant. (Filemark:) U. S. circuit court. Filed Mar. 21, 1885. Timothy Griffith, clerk.

16 United States Circuit Court, Southern District of New York.

LOUIS A. SALOMON *et al.*
against
WILLIAM H. ROBERTSON. } N. S., 9449.

The collector of the port having adjusted the amount due to the plaintiffs, under the verdict heretofore rendered for plaintiffs in this cause, at the principal sum of four hundred and fifty-five and $\frac{40}{100}$ dollars ($455.40), and the interest thereon to January 25th, 1886, the date of said verdict, at the further sum of fifty-three and $\frac{69}{100}$ ($53.69) dollars:

Now, in accordance with the stipulation made upon said trial by the attorneys for the respective parties, it is hereby stipulated that the said verdict for plaintiffs be, and is hereby, fixed and adjusted at the sum of five hundred and nine and $\frac{09}{100}$ ($509.09), for which sum the clerk will enter the said verdict accordingly.

(S'g'd) STEPHEN A. WALKER,
U. S. Attorney, for Def't.

17 (S'g'd) TREMAIN & TYLER,
Attorneys for Plaintiffs.

18 At a stated term of the United States circuit court for the southern district of New York, held at the court-rooms, New York city:

Present: Hon. Nathaniel Shipman, U. S. district judge, sitting as circuit judge.

LOUIS A. SALOMON and CHARLES SALOMON
against
WILLIAM H. ROBERTSON.

The issues joined in this cause did come on for trial at the October term, 1885, of this court, to wit, on the 21st, 22d, and 25th days of January, 1886, of said term, before the Hon. N. Shipman, U. S. district judge, sitting as circuit judge, and a jury who were duly empannelled and sworn to try the said issues, and the said parties being represented by their respective counsel and producing their

witnesses and arguments, as more fully appears by the bill
19 of exceptions filed, and the said issues being submitted to the jury after a stipulation of counsel in open court that the verdict be rendered generally for plaintiffs or for defendant, as may be, and that if for plaintiffs the amount thereof shall be adjusted by the collector of the port under the direction of the court, and the said jury having thereupon, after due deliberation, returned into court and rendered a verdict for the plaintiffs, and, as appears by the stipulation of the respective attorneys, dated September 3rd, 1886, the amount of said verdict having thereafter been adjusted at the sum of five hundred and nine dollars — ($509.09), for which sum the said verdict for plaintiffs is now accordingly hereby entered of the date of January 25th, 1886:

Now, on motion of Tremain & Tyler, plaintiffs' attorneys, it is adjudged that plaintiffs, Louis A. Salomon and Charles Salomon, do recover of the defendant, William H. Robertson, the sum of five hundred and nine $\frac{9}{100}$ dollars aforesaid, together with the sum of twenty-one and $\frac{20}{100}$ dollars ($21.20), interest on said verdict
20 from the date thereof, namely, from January 25th, 1886, to the date of this judgment, and the further sum of sixty-two and $\frac{35}{100}$ dollars ($62.35), the plaintiffs' costs as taxed, amounting altogether to the aggregate of five hundred and ninety-two and $\frac{64}{100}$ dollars ($592.64), for which sum this judgment is hereby docketed.

Judgment signed this sixth day of September, 1886.

(Signed) TIMOTHY GRIFFITH, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York. Louis A. Salomon and Charles Salomon against William H. Robertson. Judgment-roll. Tremain & Tyler, plaintiffs' attorneys, 167 Broadway, New York. U. S. circuit court. Filed Sept. 6, 1886. Timothy Griffith, clerk.

21 *Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

LOUIS A. SALOMON and CHARLES SALOMON
vs.
WILLIAM H. ROBERTSON, Collector of the Port of New York. } N. S., 9449.

And afterwards, to wit, on the 21st day of January, 1886, this case came on to be tried before the Honorable Nathaniel Shipman, district judge of the United States for the district of Connecticut, duly assigned to hold this court, and a jury duly empanelled and sworn to try the issues herein.

The parties appeared, by their counsel, Mr. Henry E. Tremain, for the plaintiff, and Mr. Henry C. Platt, assistant U. S. district attorney, for the defendant, and during the course of the trial and before the rendering of the verdict therein the counsel for the defendant did take and allege certain exceptions to certain rulings of

the court, which said exceptions were by the court duly
22 allowed and are hereinafter specifically set forth.

To sustain the issues upon his part the plaintiff introduced evidence tending to show that in December, 1883, and January and March, 1884, by the steamers Golden Horn, Plutonia, and Guilford, he imported certain merchandise upon which he was charged a duty at the rate of 20 per cent. ad valorem by the defendant, then the collector of customs at the port of New York, and paid the same under protest.

The protests, upon said trial, were offered in evidence by the plaintiff and were as follows:

NEW YORK.

SIR: We hereby protest against your ascertainment, collection, and liquidation of and demand for duties on the importations of merchandise therein mentioned and embraced in our entries as follows: Beans, per str. Golden Horn; date of entry, March 21, 1884; entry No. 37951, claiming that said merchandise is not dutiable as charged by you at the rates of twenty (20) per cent. ad valorem or at ten (10) per cent. ad valorem. We claim that said merchandise
23 should be admitted free of duty, and if not free should not be charged with duty at a rate greater than ten (10) per cent. ad valorem. Your ascertainment, liquidation, and exactions as aforesaid are submitted to under compulsion, and we pay said illegal exactions only for the purpose of obtaining or retaining possession of our goods, and we claim a refund accordingly. You are hereby notified that this protest is intended to apply to all future similar importations, and that the duplicate protest which is herewith submitted for transmission by you to the Secretary of the Treasury is our appeal to him from your decision against this protest and also from your exaction on all such entries in future as fully as if formally made on each entry thereof, and this protest is expressly hereby made to apply to all similar future exactions. In the event that you shall not yet have made your final decision on any of our said entries or respecting said exactions, you are hereby notified to read this protest then in your office, upon rendering final decision of which you are hereby requested to notify us.

24 Respectfully, L. A. SALOMON & BROTHERS,
By TREMAIN & TYLER, *Att'ys.*

Dated New York, May 9, 1884.

(The other protests are in the same form.)

The defendant duly objected to the admission of the protests in evidence upon the ground that the same were invalid and insufficient and did not set forth distinctly and specifically the grounds of plaintiffs' objection, as required by section 2931 of the Revised Statutes of the United States.

Whereupon the court overruled the defendant's objection and admitted said protests in evidence; to which ruling defendant duly excepted, and which exception was allowed by the court.

The plaintiff, Charles Salomon, being examined in his own behalf, gave evidence tending to show that the articles imported were the seeds of the field bean which he had frequently seen cultivated in the northern part of Germany, Mecklenburg, and Prussia, and being cross-examined by defendant's counsel that he was an importer of drugs and chemicals, and he identified articles exhibited to
25 him by defendant's counsel as seeds of the field bean; had never known them by any other name. Under plaintiffs' objection he was then asked as to the sample marked Defendant's Exhibit No. 1 the following questions:

Q. What are those articles used for?

A. I really cannot say; of these I have not seen any cooked. I could not say that they are used for that; we only brought in two or three lots, and don't know what they are used for. I have eaten baked beans in a restaurant; I could not say that they are these beans; Boston baked beans are universally used as food; I should say that this kind of beans was ordinarily used as food; this is an accidental importation of beans; my knowledge of beans is not very great; these are the only importations we ever made; I have samples and produce them (marked Plaintiffs' Exhibits 1, 2, and 3); we sold those beans after we imported them to dealers.

Q. What for?

A. That is something I can't tell; we sold them under the name of beans.

26 The plaintiff also produced the evidence of Walter Carr, of the firm of Walter Carr & Company, of the city of New York, whose testimony tended to show on his examination-in-chief that he had been a produce commission merchant for thirty-five years and had been all his life familiar with seeds of various kinds that are dealt in as commercial commodities in this city and elsewhere, such as flaxseed, hemp seed, rape seed, and lentils, clover seed, mustard seed, anise seed, coriander seed, and quince seed, and still a great many more that he could not bring to mind at the moment that are used for various purposes; that vegetables are commercial commodities under the general designation of vegetables. Some of the vegetables that are merchantable commodities are potatoes, onions, cabbage, cauliflower, beets, carrots, and other similar things. Being shown sample, Plaintiffs' Exhibit No. 4, he said he should say that those are green beans, vegetable products, and used as vegetables; that he should not consider the plaintiffs' samples (Nos. 1, 2, and 3) produced in court to be vegetables; that they are the seed of the plant from the field bean.

27 Q. What is the commercial or merchantable distinction, if any, between the commodities commercially classified as vegetables and seeds?

Answer. Vegetables are the edible roots and tops of plants as distinguished from dried matured seeds.

Being cross-examined by defendant's counsel he answered that the samples produced are known in trade and commerce as white

beans. He wouldn't call them white seeds, because that is already understood.

Q. Any more than you would call for corn seed?

A. It is a seed, nevertheless.

Q. Isn't corn seed the seed of the corn plant just as much as this seed is the seed of the bean plant?

A. Undoubtedly.

Q. And wheat and rye?

A. No doubt of that. The general designation of this sample when they are bought and sold is, for convenience sake, beans—the same as we say corn or rye without adding the term seed. That witness has raised beans, in a garden and out of it, in New York State. Some beans are grown in the garden, but they are not usually of the kind grown out of the garden.

28 Being shown Exhibit No. 4, he said: "I see the immatured seed here; that is a green bean." It is not in the same state as it is when it is dried; both are used for eating, but they make a different dish altogether.

Redirect examination:

There are various kinds of beans besides those indicated by plaintiffs' samples of the green beans. The string beans are used as a vegetable, and lima beans, but lima beans are dried. The beans in question (plaintiffs' samples) are the product of the field bean. String beans and lima beans are different from these, although the lima bean is grown very largely in fields. The term seed has no special signification in trade. It is a very general term. We say clover, timothy, flax without adding the word seed. It is a general or popular term.

Recross:

When seed is referred to in the trade it does not always refer to something to be planted in the ground.

Q. When you refer to timothy seed and clover seed does not that refer to something to be sown or planted in the ground?

29 A. Yes, sir. When we refer to timothy seed, clover seed, I understand is often used for other purposes.

Q. When you attach the word seed to corn, or wheat, or rye, or any other article of that kind, don't you refer to the use to which the article is to be applied, to wit, to be planted or sown?

A. Well, if a person says he wants it for seed to plant, then, of course, I should know it. In talking of corn or rye or wheat we do not usually use the word seed with it.

Q. Does not the word seed when used refer to the use to which it is to be put, to wit, to be planted or sown?

A. It is so seldom used that I can hardly answer that question; it is very seldom.

Redirect:

Some seeds are used for manufacturing purposes. Flaxseed, hemp seed, mustard seed, rape seed, and cotton seed are used for different purposes.

He does not know what apple seeds are used for; quince seeds are used for preparing bandoline.

The plaintiff also produced upon said trial as a witness
30 John P. Deininger, whose testimony tended to show that he was in the produce commission business; that he dealt in everything that grows in the ground—everything that comes from the country; in vegetables at wholesale; fruit and vegetables, according to how they are shipped to him; sometimes in large quantities and sometimes smaller—about twenty years; they are shipped to him mostly from the South and mostly from Jersey; vegetables from the South are mostly small fruit from Jersey.

Q. Tell the jury what vegetables are.

A. Potato is a vegetable, beet is a vegetable, turnip is a vegetable, and some call tomatoes a vegetable, and there are some of those kinds called soup vegetables, but there are many kinds of vegetables. He would call the plaintiffs' samples ripe white beans.

Q. What is the difference between beans and vegetables?

A. I have never known that a bean was a vegetable, not even the pod, not to my knowledge; I never sold them as such, and
31 never thought they were. In the price-currents in the trade for vegetables beans and peas are designated by themselves and not under any other heading, not in the vegetable list.

On cross-examination by defendant's counsel he said: I have no other name for them than beans and peas.

Q. What are they used for?

A. Sometimes for pork and beans and sometimes to feed pigs with. They are used largely as an article of food for man and beast. We often find them in restaurants. I sell vegetables to make soup of. There is an article of food called bean soup. These beans are used for making bean soup. The green beans—I have seen them in the summer come green, but there are no beans in them; but, in my mind, that does not make a vegetable because they are classified that way. They are beans, of course; we call them beans, but I do not call them beans; still they are sold for beans. There are no beans in them. The plaintiffs' samples we sell as beans and they belong among the serials.

Redirect examination:

32 Lentils are used to eat. Very few are grown in this country, but in Germany. They are a small seed used for eating after being cooked. I have never seen them in this country. They have been imported to sell here—used as beans and peas are, of course. When ripe they are used for the same purpose, excepting they are not used for cattle feed, because they are not planted in such large quantities. When they are dried and the seed of the

lentil is bought and sold they are not vegetables. Under the head of vegetables beans and peas are also sometimes mentioned in summer season; not ripe beans, green beans—green beans, of course, in the pod. They have got to have some heading; it grows in the country and they put it under the head of vegetables. The plaintiffs' samples here are dried beans and under the head of beans.

Recross-examination by defendant's counsel:

Q. Will you look at that bill of fare. Under the head of
33 beans do you see any baked beans there under the head of vegetables?

A. Yes; I see baked beans.

Objected to. Excluded. Exception by defendant.

Q. So that beans are sometimes classed as vegetables at this time of the year?

Objected to. Excluded. Exception by defendant.

The WITNESS: Yes, sir; baked beans are made into soup; then they are called such when you call baked beans soup.

Redirect:

Q. They are not called vegetables for the purposes of commerce?
Ans. Of course not. Baked beans are never called vegetables.

Plaintiff also produced as a witness Dr. Martin E. Wallstein, whose testimony tended to show, in answer to question calling for what scientific experience he had to qualify him to speak respecting botanical products and their distinctions scientifically: I have been a student in the Columbia School of Mines; have graduated at the University of Heidelberg, and studied at the Munich University and at Berlin University, and since 1876 have been in active practice as
an analytical chemist, and have had experience both in botany
34 and in general merchandise.

Q. Will you please state to the jury what, if anything, is the distinction between vegetables and their seeds?

To this question the defendant's counsel objected, as it referred to the scientific distinction; which objection the court overruled, and the defendant's counsel duly excepted.

Answer. Vegetables are plants, edible plants, containing from eighty to ninety per cent of water, more or less, with albumenoids of various kinds, starchy products and some salts. Seeds are the products of plants containing principally starchy matters, albumenoids, and from nine to thirteen per cent. of water. That is the scientific difference. There is authority for that proposition in the literature of botanists. I have here Musprat's Technical Chemistry; the Edible Nourishments, written by Stormain. He is recognized in Europe as one of the authorities on articles of nutrition. In the articles of nutrition he classifies the edible vegetables or edible plants into three distinct groups.

35 The first group he calls seeds and kernels, among which are enumerated peas of the various kinds and beans. The average composition of this is the minimum of water, being 7.52; the maximum, 12.80; the amount of albuminoids—the most important part for the nutrition—is, minimum, 20.88; maximum, 26.05. The fatty constituents are, the minimum, 1.85, and the maximum, 2.46. The attractive matters free of nitrogen, such as starch, sugars, mineral salts, and others, contain the minimum 55.35 and the maximum 57.46. The fibres contain a minimum of 3.11 and the maximum, 3.71. The ash ranges approximately at 2½ per cent. That is the first group under which beans is classified.

The next group are the tubers, such as onions, potatoes, beets, and so on. There the great difference is that instead of having up to thirteen per cent. of water, maximum, they contain as high as ninety-three and some odd per cent. of water. They contain the albuminoids and starch, the only true nourishing parts of the seeds.

36 They contain—the highest is three per cent.; they range as low, however, as below one per cent. The sugars and other extractive matters range from three per cent. up to twenty per cent.

The third class are what are termed in every book on the subject as vegetables—the so-called vegetables—such as asparagus, cauliflower, and all kinds of cabbage, carribi, and so on. Now, here the percentage of water ranges from a minimum of about 86.06 to a maximum of 94 per cent. The amounts of fats there in no instance, with the exception of just the leaves of the beans, run above one-half of one per cent. The starch and other matters run up to ten per cent. That is by Storman in Muspratt's Chemistry. There are other books here, but he shows the classification purely and simple, all in conformity with that classification.

It is correct to sum up by saying that the mature seed is dried and is a different product from the vegetable—the plant itself—and different states of maturity and different parts of it.

37 On cross-examination the witness testified: The title of the work is Muspratt's Technical Chemistry, written in German, of which there is an English edition. These plants belong to the leguminosæ, classified as such. Legume and leguminosæ are two different things entirely. If you wish to have the scientific or general definition I can give it. The meaning of the word legume is a substance containing nitrogen—a nitrogeneous matter. The word legume is French and means vegetable—pure and simple— but that is not the scientific meaning.

Q. Is there any classification except in German works?

A. It is classified under the head of legu*nimo*sæ; that is not French; it is Latin, and it is under that head—legume; that the French classified the three different heads that I have specified. I cannot tell what order beans belong to in the Linnean system; they belong to the same system as of all modern botanists. I cannot tell what kind of flowers they bear; I never saw the plant green. I have only seen the product. I can give you the exact description

of them here—that is, what they are termed in all scientific works—or white beans.

By a JUROR:

38 Q. Has that sample been kiln-dried or simply dried (referring to plaintiffs' sample)?

A. I have never prepared any, but, as far as I know, it is dried.

Q. If it was kiln-dried would it propagate?

A. Not if the kiln-drying goes above a certain degree of heat, so as to destroy the germ. These are not so highly dried. I should think those could be used; I do not know. That has not been kiln-dried—simply dried.

By defendant's counsel:

Q. Is the botanical difference between vegetables and seeds simply in the amount of water that they contain?

A. No, sir; I never said that.

Q. I judged so from the testimony; am I right?

A. No; I think you are incorrect. They contain albuminoids and starchy matter in various degrees.

Q. What other difference is there except in the quantity of water?

A. My definition was in giving it as an article of nourishment—not hypothetical at all. My experience with these products goes so far as they pertain to the nourishment of the people—the analysis of the products—and in that nature I claim to be an expert.

39 I am not an expert botanist; I am a chemist; my experience is simply as an article of food; these are edible beans. I have analyzed, but I don't think I have analyzed those; have analyzed those mostly for their oils and albumens and starch. I cannot recall that I have analyzed any of the beans, but my knowledge comes solely from the authorities given on their products from the seed. I cannot recall reading the analysis made by Einhoff. I suppose that he made some analysis. If they were shown to me I could say whether they were approximately correct (paper shown). I suppose it is correct. I would not state positively, but I think it is. I would take it to be so from my knowledge as a chemist. There is one item there I do not quite understand, but I suppose it is correct; that item is vegetable animal matter; then it has albumens right behind it. I should place the two together as nitrogeneous matters. This is not a more particular analysis in detail than those I made. If I wanted albumens of certain kinds it would be important also,

40 but it is never regarded. I don't understand what he means by the sentence, "In 3340 ripe beans, are obtained the following substance: Volatile matters, 600." I understand "skins, 386." I don't say that the following is a substantially correct analysis: "Starchy, fibrous matter, 610; starch, 1312; vegetable matter, 417; albumen, 31; extraction soluble in alcohol, 136; gummy matter, 177; earthy phosphates, 37½; loss, 133½; making 3840." I think that is the analysis. I can't say how close it is at all. I have my authorities here. I will try to convert those figures into percentages

Volatile matter, 600; that I don't understand. Skins, 386; that does not correspond. I have here 3.71 per cent.; that would be about 150 to 175 parts in 3840.

Starchy, fibrous matter, 610; there is another definition that I would like to have explained; no starchy, fibrous matter; that is not a scientific expression and not an analytical expression. I don't doubt that Einhauf was a scientific man.

Starch, 1312; that does not correspond; that would be in
41 3840 parts; that would figure about 55.35, which would be approximately 1900.

Vegeto-animal matter, 417; that is another thing I don't understand, unless he means albuminoids. He says albumen, and unless he means albumenoids—which he might comprise under that head.

Albumen, 31; that doesn't correspond. I have 23.32 per cent., which would be about 800 parts in 3840.

Extractions soluble in alcohol, 136; that might be correct. I don't understand that fact at all. I have nothing under that head.

Gummy matter, 177; nothing under that head, because gummy matter is a very great question.

Earthy phosphates, 37½; that is comprised in the ashes; the ashes here are very much greater.

Loss, 137½; you can't possibly say what that is. I wouldn't accept such an analysis for my own, and I would not give it as my own.

I never made a personal analysis of this kind of bean before. I am, then, unable to state from my own knowledge the exact
42 proportions in these articles. I take authorities for that. I have no experience in raising beans; never planted any. The small quantity of water that I spoke of is one great difference between what I call a vegetable and what I call a seed. That comes by reason of the seed being dried to some extent; the water evaporates.

Redirect:

The ones I examined are not kiln-dried; the propagating elements are still there. Besides being a chemist I have a general knowledge of botany; necessarily so. The authorities correspond, so far as my examination has extended, with the testimony I have given.

The testimony of Alfred Roelker, on behalf of the plaintiff, tended to show that witness' firm of Windmuller & Roelker have imported these articles from various parts of the world, from the Mediterranean as well as from the Baltic and from Bremen, and knew the articles as a commercial commodity; that there are certain classes of these beans which are dealt in; they are known as medium
43 beans, pea beans, and marrow beans, which constitute the largest part of the beans which are dealt in. They come from Hungary, Turkey, and the eastern part of Germany, and they did come here by thousands of bags and ship-loads when the article paid to bring it here within two years. Now, it is almost discontinued; that the plaintiffs' samples are seeds of a plant which grows in fields, and after blooming a pod forms, and after it is sufficiently matured

it is dried and then separated from the pod and brought to the market and put into bags and sent to the shipping ports for export. It is thrashed, gathered, and brought to market in large quantities, and is an article of consumption the world over, an article of commerce used by armies and by navies to a great extent.

And on cross-examination this witness testified: There is a difference between the bean that is grown to be used green and the bean that is grown to be used dried, and there are a great many different kinds of beans; for instance, they have a more fleshy bulb than the bean of which this is a sample. This species of
44 bean is not, to my knowledge, grown in this country in gardens. The beans that are grown in gardens are such as are used green in the markets. These beans are not used that way.

Q. Do you know whether they are grown in this country in gardens or not?

A. I don't know whether somebody does grow them in that way, but they were not intended to be grown in that form.

The testimony of Ignatius M. Scheiner, a witness called on behalf of the plaintiff, tended to show that he was born in Hungary and lived there fifty years and exported beans as an article of food from that country. Beans are produced abroad in Hungary in fields just like corn. They are gathered together by the villagers in the fall of the year. The villagers bring them to the market and the merchants buy at the small farms, and they thus accumulate it in large quantities. I have exported lentils and seen them grow. They grow in open fields, same way as beans; peas also.

The testimony of John Wakeman, a witness produced on
45 behalf of the plaintiff, tended to show that he was a produce merchant of the firm of Wakeman & Company, doing business for the past thirty years in the city of New York, dealing in beans and similar articles. Beans is one of my specialties. We handle a good many. They are the seed of the bean plant and have been an article of commerce for many years. The ground is prepared to cultivate them the same as for corn. They are raised in hills or drills and the field bean is grown on a bush about eighteen inches or two feet high. When full grown they produce a flower, and when they become matured they are sometimes pulled and sometimes cut and left for the sun to cure them in the fields for a certain time, and then they are taken to a barn and thrashed out and carried by the farmers to the market, and there put in barrels or bags and become an article of wholesale trade. Most of the beans that grow in our own State are picked by hand. Take Brockport, for instance, where they handle large portions of them; they have large premises specially adapted for that business, and a large part of the employees are girls, principally to pick the beans over.
46 By picking them over I mean picking out the imperfect beans—what we call the dead beans. The part of the bean that happens to touch the ground becomes discolored, and they are sorted out and are run down elevators down shutes, into large vans,

and those vans are moving, and the beans are spread out and thinned out and the girls pick them as they go along, and they are dumped off and from there go into barrels and are sent to market. This is about the way they are produced in this country when they become the articles of wholesale trade that I have described. They are raised in large quantities in this State in large fields. I have seen as many as twenty acres with nothing but beans on them. There are other seeds that form a commodity in the produce business for consumption besides the seeds of the bean plant. Peas are the same. They go through the same process and they are also a seed. I suppose wheat is a seed and corn, oats, and barley.

On cross-examination by defendant's counsel·

He don't know this article by any other commercial classi-
47 fication except beans, only as a man mentions a special variety, such as pea beans, marrow beans, kidney beans, China beans, refugee beans, Mohawk beans. We sometimes sell them under the name of seeds.

Q. Under what circumstances?

A. When a man comes in and asks for some beans to plant I would not like to say that we make a distinction in the character of the article according to the use for which it is intended.

Q. Are they regarded commercially as seeds when intended to be used for reproductive purposes and as produce for food when they are intended to be used as food?

A. I do not know that I really understand you. In selling these goods it is difficuly for us to tell the intention of the buyer. We deal in these goods in large quantities, and they only get to the consumer after they leave us.

Q. Is there that commercial designation?

A. There are beans sold especially in garden seasons here in this city. I would not want to say beans of that character. We do not make a specialty of goods of that class.

Q. Beans how closely resembling them?

A. White beans.

48 Q. Or when beans are sold for garden seeds here?

A. They might be. I don't know positively. I think so.

Q. What is a seed?

A. A bean is a seed; a pea is a seed. There are forty different varieties. Cauliflower, timothy, potatoes are seeds. It is a product of a plant by which that plant is propagated. A seed when it is of certain plants is largely used for food as well as propagation, and in that condition a seed is an article of commerce for both purposes. I think there is no commercial usage within my experience to the contrary of those propositions. When speaking of the commercial name of this article being beans that is a general term that describes all seeds of the bean plant, and it is so accepted in commerce, I should think. When a particular kind of bean is desired that bean is described by its particular name, such as China bean, kidney bean, &c. So far as the bean is an article of importation its chief value is found in its use for consumption. I do

not know of any other way to propagate the bean except from this seed or seed of this character. What you
49 call the garden bean is sold by seedsmen; mostly sold by seedsmen in a smaller way. This is not that article (referring to plaintiffs' samples); there are several different varieties of string beans—several different varieties of garden seed, both in the pod and out of the pod. Those products are used as food, both the seeds and the entire plant, pod and all, of string beans. This article has been dried; has been submitted to a process that makes it an article of general merchandise; has been cured by the sun. We sometimes use lentils; the lentil is, you may say, of the same family as beans. They grow both on the other side and here. I have never seen them grow; they mostly grow in Wisconsin. I have seen the article, however; it is produced in the market. I think they are more like a pea than they are like a bean. This (sample of lentil shown me) is a foreign production, I should think. The lentil we raise here is not so large a size; they grow in a pod the same as beans and peas, and I think are cured in the same way. To the best of my knowledge, beans like these samples before me
50 are not grown in market gardens in this State as an article of commerce. A man might raise half a bushel or a peck, but as an article of commerce they are a product of the fields, so far as my experience extends.

The plaintiff also produced the testimony of I. Augustus Stanewood, whose testimony tended to show that he was in the auditor's department of the custom-house; that it was a part of his usual business to be acquainted with the orders that are given for readjustment of entries protested upon.

Q. Has a statement in this case of Salomon against the collector been made up in the usual course of business under the direction of the department for a readjustment of these entries at ten per cent. wherever twenty per cent. duties have been paid?

To this question defendant's counsel objected as irrelevant and incompetent.

The court admitted it for the purpose of showing the credit; to which ruling the defendant's counsel duly excepted.

Answer. There has been a statement in this case under the department's circular.

51 Q. And that circular is a letter dated June 1, 1885, directing the adjustment on entries of this character at ten per cent., is it not?

To which question defendant's counsel duly objected. Admitted.

Answer. Under that circular.

At this point the defendant rested.

The defendant produced as a witness in his behalf James Reed, whose testimony tended to show he was a seedsman with Peter Henderson & Company, of the city of New York, and had been with

them for eight or nine years, doing a large business in the seed line. I know what garden seeds are.

Q. Are these (showing plaintiffs' samples) samples of garden seeds?

A. I cannot say.

Q. White?

A. Well, there are white beans that look very similar to it; my opinion is they are not garden seeds.

Q. Are there white beans of that kind or like those that are grown in gardens?

A. Yes, sir.

Q. Do you know whether the term seed, as used in the trade prior to the 3rd of March, 1883, had any different meaning from
52 the ordinary acceptation of the word—in other words, was there anything which was in fact a seed which commercially was not so regarded?

A. Yes; I think there was.

Q. By way of illustration?

A. Just such beans as these that were imported.

Q. You say commercially those were not known as seeds prior to the act of 1883?

A. Not in the seed trade proper; they would not consider them as such. During the period that I have been with Peter Henderson & Co. I have made myself familiar with the trade classifications and distinctions of the various articles that I deal in so far as they relate to my business, which was the seed business.

Q. Is it true of many of the seeds that you deal in that articles of the same class were used for other purposes than for seed?

A. There are some articles that are used both for seeds and for other purposes, as, for instance, beans, peas, corn to some extent, wheat, and peas of various kinds, used for the purpose of food and manufacturing.

Q. Was it part of your business to make yourself familiar
53 with the use of the terms by those who deal in beans and corn usually, of the articles that you have named, for the purposes of food or manufacture?

A. No, sir; I do not make myself familiar with the distinctions as used by them.

Cross-examination by plaintiffs' counsel:

Q. Has anybody ever come to your store and asked to buy seeds?

A. I think they have; yes, sir. On such occasions, in the ordinary course of business, my first response would be to ask him what sort of seeds he required. If he said beans I would ask him what variety; if peas, the same question; if lentils, I would most likely say I did not have any; we don't keep them. If he asked for the seed of the field bean I would say we have them.

Q. (Showing paper package containing samples of beans.) Look at that and say if you think that would answer such a description?

A. Yes, it might.

Q. You would use them for that, would you not?

A. Yes, probably would.

Q. Would you put them up in a paper on which you would say, if the purchaser does not accept these seeds on these conditions they must be returned at once?

A. I think we would; yes.

54 —. Those (showing same paper package) are the kind of goods that come from Peter Henderson & Co. Does the term seed mean anything peculiar and different in the trade than it does out of the trade?

A. I wouldn't say it did, sir. I can only answer by comparison as to how many bushels, on an average, one bushel of those beans planted as seeds will produce. I would say, perhaps, according to the season, from thirty to fifty bushels to one acre. It would make an average of forty, and they would raise, I should think, from one hundred to one hundred and twenty-five bushels per acre. One hundred bushels of this variety, and I should judge it would take about three bushels to plant an acre, more or less depending upon the quality of the ground and the season and the climate. We sell these articles for any purpose, if a customer wants them. We never inquire the purpose, and I don't know whether it is for manufacturing or for seed unless it is stated by the purchaser. We sell all kinds of seeds.

55 Also the testimony of J. William Ahles, a produce commission merchant, whose testimony tended to show as follows:

I have been a produce commission merchant for the past 15 years, and have had experience as an agriculturist, and know about the product of field beans. The way which I have seen them grow is that they were planted in large fields in rows, the very same as potatoes, and cultivated very much the same way. They grow on bushes perhaps 18 inches high and on which form pods and in those pods the bean. They are allowed to ripen by the sun, and when sufficiently ripe they are pulled off by hand or machine. There are a number of places in New York State where they go into the bean-raising very largely. They have machines—piling them on the ground and putting them in rows, and allow them to remain there several days for further drying, and then are taken into barns and thrashed, and sometimes they are thrashed in the fields. After thrashing they are screened and taken to market. A num-

56 ber of large farmers pick their own beans—that is, they pick out any beans that are not marketable and that are off color, a little eaten by grub or something of that kind. I have seen beans similar to these samples shown me grow the same kind of beans—very similar.

Q. Is there any special classification in trade and commerce with the term seeds that differs from its ordinary acceptation?

A. None that I know of particularly. The ordinary acceptation of the term seed is anything from which a plant can be grown. I presume it is the seed of it.

Q. Do you regard a thing as a seed when intended to be used for

reproduction, and cease to regard it as a seed when intended to be used for food?

A. I don't know that I should.

Q. Do you, as a matter of fact, in the trade?

A. Yes; I think I do.

Q. You don't regard the corn that you deal in as such, do you?

A. No; it is sold as corn; we do not know what becomes of it after it is sold, and we don't care.

Q. You know, as a matter of fact, that the principal part of it is used for food?

57 A. We presume it is.

Q. So with rye and oats?

A. Undoubtedly.

Q. So with beans?

A. Yes, sir; I should not think that beans like those samples are grown at all in gardens. If any one grew them once they would not a second time, if they wanted to eat them green; they might grow them, as a great many people do, to get seeds and plant them. A man can raise anything he wants in a garden. I hardly think, as a matter of fact, that beans like these are raised in gardens to be used for something other than in the green state, because they require more room; they could not raise enough of them to make it an object.

Also the testimony of George Dryel, tending to show:

I have been a gardener in New York for 26 years, and know field beans like these (samples); they are cured or dried; they grow in land, same as other vegetables.

Q. Do you grow many of them?

A. No; we don't care for many of them; we cannot get any of them in the market green; we raise some refugees; these (indicating plaintiffs' samples) are raised in Europe. We use beans

58 like those there as seed for gardening, but — not raise them; we raise refugees. They have a different color and are not so much round—are more flat; are more blue; these are white. I raise refugees—eat some—but we bring them here to market green before they are ripe.

Q. Are the seeds like these?

A. No; they are blue; the difference when they are ripe is they might be a little bigger.

Q. The fact that these beans are dried would not prevent them from propagating?

A. No; when they are dried you can keep them as long as you want; they are just as good for seed.

Also the testimony of Henry G. Larowe, a produce dealer of the firm of Ege & Otis, tending to show that he had been in the produce business for fifteen years or over, and deals in beans substantially like the plaintiffs' exhibits, selling something like 200,000 bushels a year.

Q. For what purpose do you sell them?

A. We sell them principally for consumption as food; they are sold, however, without restriction.

Q. Can you, from the nature of your business, and dealing
59 as largely as you do with them, give us an idea as to the amount that is sold for food, in proportion to the amount that is sold for seed to be planted in the ground?

A. No, sir; I could not give any definite answer to that question.

Q. Can you give your best information—your best belief—about it?

(Objected to.)

A. My best belief is that we sell 100 barrels for consumption to one of seed; at least that; I have no positive knowledge; I deal in about 200,000 per year; have sold more domestic than foreign goods; sell without reference to what the purchasers use them for.

Q. Does it make any difference in trade or commerce what use is to be made of them?

A. Not as far as beans are concerned; I should think it made no difference whatever; the proportions I have given are not my actual knowledge.

The defendant also produced the testimony of Julius M. Fairchild, tending to show:

My business is restaurant; I have been in that business about 18 years, in this city; I keep the International Dining Room, 19
60 Park Row; not such a very large restaurant; do a fair business.

Q. Will you please state to the jury under what class of things edibles belong—the articles commonly known as Boston beans?

Objected to.

(By the COURT:) If you can show any commercial usage, all right.

Q. You are acquainted with the article beans in your business?

A. Somewhat, sir.

Q. Will you look at that sample (showing witness plaintiffs' sample No. 3)?

A. I should call them beans easy enough.

Q. Are those edible beans?

A. The beans that they use are; yes, sir; those are beans; I have seen a great many of them.

Q. And cooked a great many of those in your business?

A. Yes, sir; have them cooked.

Q. In your business and in the business generally in which you are engaged, what are those beans known as?

Objected to. Objection sustained; to which ruling defendant's counsel duly excepted.

Q. Have you bought and sold beans?

A. Yes, sir.

Q. As what—under what name?

(Objected to, but answered.)

61 A. There are several kinds of beans; the beans we use mostly in our business are called the Marrow, and that is the kind I buy mostly.

Q. In what quantities?

A. Oh, I buy them by the bushel sometimes; sometimes by the barrel for cooking.

Q. As an article of food, what is the common name given to those beans?

Objected to as immaterial and irrelevant.

The COURT: I don't think you can prove the commercial designation in that way.

DISTRICT ATTORNEY: We do not desire to prove the commercial designation by this witness, but the common designation.

The COURT: I do not think I can permit that from the testimony. I will exclude that question.

Counsel for the Government excepts.

This witness further testified that he had raised beans in the garden and field both; had raised them in his garden among other vegetables, and sells them cooked as an article of food.

By defendant's counsel:

Q. Under what name?

The question was objected to by counsel for the plaintiff-; which objection was sustained by the court; to which ruling defendant's counsel duly excepted.

62 Also the testimony of Frederick Keith, tending to show that he was the manager of the Astor House restaurant, in the city of New York; that in the Astor House beans are used as food to the extent of about a barrel in ten days. This kind of beans (plaintiffs' exhibits) we use baked, as a rule, and sometimes in soup.

By defendant's counsel:

Q. What are they commonly called when baked?

This question was objected to by counsel for the plaintiff- and the objection sustained by the court; to which ruling of the court defendant's counsel duly excepted.

We boil them and bake them afterwards. We soak them and mash them up when we make them into bean soup.

Also the testimony of Arthur T. Hurd, tending to show that he had dealt extensively in beans, to the amount of millions of bushels, the same articles as those shown to him (plaintiffs' exhibits), with which he is familiar; that they are known as beans, white beans, in trade and commerce, and generally used as an article of
63 food; has seen them in the garden; they are used largely by armies and navies.

Defendant's counsel then moved that the court direct a verdict for the defendant on the ground that there is not sufficient evidence to warrant a verdict for the plaintiff-; which motion was denied by the court, and to which ruling the defendant's counsel duly excepted.

Defendant's counsel then requested the court to charge the jury that if the jury find that the imported articles, edible beans, are not commercially or commonly, accorded to the general usage and known denominations of trade, known as seeds, and are otherwise designated and provided for in the tariff act, their verdict should be for the defendant; which request the court refused to charge; to which ruling defendant's counsel duly excepted.

Also that if the jury find that the imported articles are not designated or enumerated in the tariff act, and that they bear a similitude to vegetables, either in material, quality, texture, or the
64 use to which they may be applied, then their verdict should be for the defendant; which request was denied or refused by the court, and to which ruling defendant's counsel duly excepted.

Also that if the jury find that the imported articles are garden seeds that are sometimes planted in gardens and sometimes in fields, and that they are commercially known as garden seeds, then their verdict should be for the defendant; which request the court refused to charge; to which ruling the defendant's counsel duly excepted.

Also that if the jury find that the imported articles are not enumerated or provided for in the tariff act by either the designation of seeds, garden seeds, or vegetables, and if they find them to be raw or unmanufactured articles, then their verdict should be for the defendant; which request the court refused to charge, and to which ruling the defendant's counsel duly excepted.

Whereupon the court charged the jury as follows:

65 *Charge.*

SHIPMAN, *J.*:

GENTLEMEN OF THE JURY: The plaintiffs in this case imported into this port in the years 1883 and 1884, by three different vessels, certain quantities of white beans, upon which the collector levied a duty of twenty per cent. as garden seeds. That rate of duty was paid under protest, the plaintiffs insisting that the article was duty free as seeds "not otherwise provided for," and that if not seeds they were dutiable at ten per cent.

The Treasury Department has receded from its position that the articles were garden seeds, and has directed a refund of ten per cent., so that the only question before you is whether they should have been admitted duty free as seeds or should have paid a duty of ten per cent. as vegetables.

White beans are unquestionably the seeds of the field bean, but the Government claims that they are also, in the universal or general definition of the word, vegetables, and therefore come within the term vegetable, which term was in the schedule of the tariff act relating to provisions.

66 This is the only question of fact—are they or are they not vegetables in the ordinary and usual definition of the word? If they are—as white beans are undoubtedly used vastly more for purposes of food than as seeds—they are dutiable at ten per cent.,

and your verdict will be for the defendant, because the plaintiff- concedes that *he is* to credit to the Government the ten per cent. which has — ordered to be refunded.

One witness for the plaintiff-, Mr. Carr, defines vegetables to be the roots or tops of plants, as distinguished from their dried, matured seeds, which would exclude such articles as tomatoes, potatoes, turnips, pumpkins, and cucumbers.

Another witness defines vegetables to be the green product of the plant, making the definition of vegetables depend upon its perishable character, whether green or dry.

The plaintiff- relies upon the uncontroverted fact that they are seeds, and says that they cannot properly be called vegetables, which *he* would limit to the definition by Mr. Carr. The commer-
67 cial designation of the article or what the article is called in trade and commerce, or the name bean, has nothing to do with the question.

The defendant says that the general definition of the word vegetable, as contained in Webster's Dictionary, is this: "A plant used for culinary purposes and cultivated in gardens or destined for feeding cattle, sheep, or other animals." And the defendant further says that white beans are embraced in this definition of vegetables, and are generally used for culinary purposes, that being their sole use, except the portion used for reproduction; and he says that it is straining a point to call them seeds for tariff purposes, they being, in fact, vegetables.

It is conceded, and I charge you, that a term employed by Congress to designate an article as the subject of duty is to be understood in its ordinary commercial sense, rather than its technical or scientific meaning, where they differ.

I charge you furthermore, as requested by the plaintiff-, that, as various kinds of seeds are used for various purposes and have various names, the circumstances that these articles are edible
68 and as a commodity are a staple article of food is not controlling.

Nor does the fact that the articles are known as beans or white beans or dried beans withdraw them from the classification of seeds, if they are seeds; and if you believe from the testimony that vegetables are the edible roots or tops of plants, as distinguished from their dried, matured seeds, then your verdict will be for the plaintiff-.

Plaintiffs' counsel said: Your honor stated Mr. Carr's definition would exclude a certain article, but we say that if his definition be exactly quoted it would not exclude it, as his language is, "Edible roots or tops of plants;" upon which the court said to the jury: If I did omit anything from the definition your better recollection will supply it.

To that portion of the charge which states "the commercial designation of the article or what the article is called in trade and commerce, or the name bean, has nothing to do with the question" the defendant's counsel duly excepted.

69 Thereupon the jury returned a verdict for the plaintiff-.

And forasmuch as the exceptions, matters, and things afore-

said would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said defendant by his counsel, and it is ordered that the same be filed as a part of the record herein with like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand, at New York, this 25th day of August, 1886.

N. SHIPMAN, *Judge.*

70 (Endorsed:) N. S., 9449. U. S. circuit court, southern district of New York. Louis A. Salomon and Charles Salomon *versus* William H. Robertson. Bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Sep. 6, 1886. Timothy Griffith, clerk.

71 *Assignment of Errors.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, Plaintiff in Error,
vs.
LOUIS A. SALOMON & CHARLES SALOMON, Defendants in Error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justice- of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Stephen A. Walker, his attorney, and says that in the record and proceeding- aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

(S'g'd) STEPHEN A. WALKER,
Attorney for Plaintiff in Error.

72 [Endorsed:] 9449. United States Supreme Court. William H. Robertson, plaintiff in error, *vs.* Louis A. Salomon & ano., defendants in error. Assignment of error. Stephen A. Walker, attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 8 day of September, 1886. (S'g'd) Tremain & Tyler, attorneys for defendants in error. (File-mark:) U. S. circuit court. Filed Sept. 8, 1886. Timothy Griffith, clerk.

73 *Joinder in Error.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, Plaintiff in Error,

ag't

LOUIS A. SALOMON & CHARLES SALOMON, Defendants in Error.

And afterwards, to wit, on the second Monday of October, in the October term, 1886, the said defendants in error, by Tremaine & Tyler, their attorneys, freely come here into court and say that there is no error, either in the record of the proceedings aforesaid or in the giving of the judgment aforesaid, and they pray that the said Supreme Court of judicature, before the justices thereof now here,
74 may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

TREMAIN & TYLER,
Attorneys for Defendants in Error.

H. E. TREMAIN,
Of Counsel for Defendant- in Error.

(Endorsed:) U. S. Supreme Court. William H. Robertson, plaintiff in error, *vs.* Louis A. Salomon & *al.*, defendants in error. Joinder in error. Service of a copy of the within joinder in error is hereby admitted this 23d day of Sept., 1886. Stephen A. Walker, att'y for pl'ff in error. U. S. circuit court. Filed Sept. 23, 1886. Timothy Griffith, clerk.

75 UNITED STATES OF AMERICA, *ss:*

To Louis A. Salomon & Charles Salomon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William H. Robertson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 7, 1886.

WM. J. WALLACE.

76 [Endorsed:] 9449. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Louis A. Salomon & ano., defend-

said would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said defendant by his counsel, and it is ordered that the same be filed as a part of the record herein with like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand, at New York, this 25th day of August, 1886.

N. SHIPMAN, *Judge.*

70 (Endorsed:) N. S., 9449. U. S. circuit court, southern district of New York. Louis A. Salomon and Charles Salomon *versus* William H. Robertson. Bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Sep. 6, 1886. Timothy Griffith, clerk.

71 *Assignment of Errors.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, Plaintiff in Error,
vs.
LOUIS A. SALOMON & CHARLES SALOMON, Defendants in Error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justice- of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Stephen A. Walker, his attorney, and says that in the record and proceeding- aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

(S'g'd) STEPHEN A. WALKER,
Attorney for Plaintiff in Error.

72 [Endorsed:] 9449. United States Supreme Court. William H. Robertson, plaintiff in error, *vs.* Louis A. Salomon & ano., defendants in error. Assignment of error. Stephen A. Walker, attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 8 day of September, 1886. (S'g'd) Tremain & Tyler, attorneys for defendants in error. (File-mark:) U. S. circuit court. Filed Sept. 8, 1886. Timothy Griffith, clerk.

73 *Joinder in Error.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, Plaintiff in Error,

ag't

LOUIS A. SALOMON & CHARLES SALOMON, Defendants in Error.

And afterwards, to wit, on the second Monday of October, in the October term, 1886, the said defendants in error, by Tremaine & Tyler, their attorneys, freely come here into court and say that there is no error, either in the record of the proceedings aforesaid or in the giving of the judgment aforesaid, and they pray that the said Supreme Court of judicature, before the justices thereof now here,
74 may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

TREMAIN & TYLER,
Attorneys for Defendants in Error.

H. E. TREMAIN,
Of Counsel for Defendant- in Error.

(Endorsed:) U. S. Supreme Court. William H. Robertson, plaintiff in error, *vs.* Louis A. Salomon & *al.*, defendants in error. Joinder in error. Service of a copy of the within joinder in error is hereby admitted this 23d day of Sept., 1886. Stephen A. Walker, att'y for pl'ff in error. U. S. circuit court. Filed Sept. 23, 1886. Timothy Griffith, clerk.

75 UNITED STATES OF AMERICA, *ss:*

To Louis A. Salomon & Charles Salomon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William H. Robertson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 7, 1886.

WM. J. WALLACE.

76 [Endorsed:] 9449. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Louis A. Salomon & ano., defend-

ants in error. Citation. Stephen Walker, attorney for plaintiff in error. Service of a copy of the within citation is hereby admitted this 8th day of September, 1886. Tremain & Tyler, J. S. D., attorneys for defendants in error.

Endorsed on cover: S. New York C. C. U. S. No. 751. William H. Robertson, collector of the port of New York, plaintiff in error, *vs.* Louis A. Salomon and Charles Salomon. Filed October 13, 1886.

In the Supreme Court of the United States, October Term, 1888.

WILLIAM H. ROBERTSON, Collector of the Port of New York, Plaintiff in Error,
vs.
LOUIS A. SALOMON and CHARLES SALOMON.
No. 446.

In error to the circuit court of the United States for the southern district of New York.

Motion to Advance.

And now, December 3, 1888, comes the plaintiff in error, by the Attorney General, and moves the court to advance the above-stated case, in accordance with section 5 of rule 26, on the ground—

(1.) That it is a revenue case in which the United States is concerned.

(2.) That the question involved is the construction of the customs revenue laws as to whether beans imported should be taxed as vegetables or be admitted free as seeds.

(3.) That over one hundred cases now pending in the courts of the United States are dependent upon and will be substantially disposed of by an authoritative determination of the construction of the revenue statutes involved in the question.

(4.) That a large number of protests and appeals on which suits have not yet been brought will be disposed of.

(5.) That the Secretary of the Treasury has requested that a motion to advance be made in order to facilitate the administration of the customs revenue service by an early authoritative construction of the law.

A. H. GARLAND,
Attorney General.

(Endorsed:) Sup. Court U. S. 1888, Oct. term. No. 446. Wm. H. Robertson, coll'r, &c., pl'ff in error, *vs.* Louis A. Salomon *et al.* Motion to advance. Filed Dec. 3, 1888.

NOTE.—The foregoing motion was filed and submitted on the 3d day of December, 1888; granted on the 10th day of December, 1888, and the case argued on the 16th day of January, 1889.

34 Office Supreme Court U. S. Filed Dec. 26, 1888.
James H. McKenney, clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

WILLIAM H. ROBERTSON, COLLECTOR of the port of New York, plaintiff in error,
vs.
LOUIS A. SALOMON AND CHARLES Salomon.
No. 446.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

35 In the Supreme Court of the United States, October Term, 1888.

WILLIAM H. ROBERTSON, Collector of the Port of New York, Plaintiff in Error,
vs.
LOUIS A. SALOMON and CHARLES SALOMON.
} No. 446.

In error to the circuit court of the United States for the southern district of New York.

Brief for Plaintiff in Error.

Abstract of the case.

Between the 17th of December, 1883, and the 21st of March, 1884, the plaintiffs below made three importations of beans at the port of New York. The collector charged a duty of 20 per cent. ad
36 valorem, which the importers paid under an alternative protest, claiming the goods should not have been taxed at the rate of 20 per cent. ad valorem nor 10 per cent. ad valorem, but should have been admitted free, or at a tax of 10 per cent. ad valorem. Ten per cent. of the duty was ordered to be refunded by the Treasury Department, and 10 per cent. was retained. Suit was brought to recover from the collector so much of the duty paid as was not refunded.

There are two general questions in the case.

First. Is the protest sufficient?

Second. Were the goods on the free list?

Specifications of Error.

(1) The court erred in overruling the objection of the defendant's counsel and admitting the protests, as follows: (Rec., p. 10.)

The defendant duly objected to the admission of the protests in evidence upon the ground that the same were invalid and insufficient and did not set forth distinctly and specifically the grounds of plaintiffs' objection as required by section 2931 of the Revised Statutes of the United States.

(2) The court erred in overruling the offer of defendant's counsel to prove what was the common name of the import, as set forth in the following exception (Rec., p. 25):

Q. As an article of food, what is the common name given to those beans?

Objected to as immaterial and irrelevant.

37 The COURT: I don't think you can prove the commercial designation in that way.

DISTRICT ATTORNEY: We do not desire to prove the commercial designation by this witness, but the common designation.

The COURT: I do not think I can permit that from the testimony. I will exclude that question.

Counsel for the Government excepts.

This witness further testified that he had raised beans in the garden and field both; had raised them in his garden among other vegetables, and sells them cooked as an article of food.

By defendant's counsel:

Q. Under what name?

The question was objected to by counsel for the plaintiff; which objection was sustained by the court; to which ruling defendant's counsel duly excepted.

Also the testimony of Frederick Keith, tending to show that he was the manager of the Astor House restaurant, in the city of New York; that in the Astor House beans are used as food to the extent of about a barrel in ten days. This kind of beans (plaintiffs' exhibits) we use baked, as a rule, and sometimes in soup,

By defendant's counsel:

Q. What are they commonly called when baked?

This question was objected to by counsel for the plaintiff, and the objection sustained by the court; to which ruling of the court the plaintiffs' counsel duly excepted.

(3) The court erred in refusing to affirm defendant's first point, which is (Rec., p. 26):

Defendant's counsel then requested the court to charge the jury that if the jury find that the imported articles, edible beans,
38 are not commercially or commonly, accorded to the general usage and known denominations of trade, known as seeds, and are otherwise designated and provided for in the tariff act, their verdict should be for the defendant; which request the court refused to charge; to which ruling defendant's counsel duly excepted.

(4) The court erred in refusing to affirm defendant's second point, which is (Rec., p. 26):

Also that if the jury find that the imported articles are not designated or enumerated in the tariff act, and that they bear a similitude to vegetables, either in material, quality, texture, or the use to which they may be applied, then their verdict should be for the defendant; which request was denied or refused by the court, and to which ruling defendant's counsel duly excepted.

(5) The court erred in refusing to affirm defendant's third point, which is (Rec., p. 26):

Also that if the jury find that the imported articles are garden seeds that are sometimes planted in gardens and sometimes in fields, and that they are commercially known as garden seeds, then their verdict should be for the defendant; which request the court refused to charge; to which ruling the defendant's counsel duly excepted.

(6) The court erred in refusing to affirm defendant's fourth point, which is (Rec., p. 26):

Also that if the jury find that the imported articles are not enumerated or provided for in the tariff act by either the designation of seeds, garden seeds, or vegetables, and if they find them to be raw or unmanufactured articles, then their verdict should be for
39 the defendant; which request the court refused to charge, and to which ruling the defendant's counsel duly excepted.

(7) The court erred in the portion of the general charge included in the following exception (Rec., p. 27):

To that portion of the charge which states "the commercial designation of the article, or what the article is called in trade and commerce, or the name bean, has nothing to do with the question" the defendant's counsel duly excepted.

Brief of Argument.

I.

The protest is insufficient. It is (Rec., p. 19):

We hereby protest against your ascertainment, collection, and liquidation of and demand for duties on the importations of merchandise therein mentioned and embraced in our entries as follows: Beans, p'r str. Golden Horn; date of entry March 21, 1884; entry No. 37951, claiming that said merchandise is not dutiable as charged by you at the rates of twenty (20) per cent. ad valorem, or at ten (10) per cent. ad valorem. We claim that said merchandise should be admitted free of duty, or if not free, should not be charged with duty at a rate greater than ten (10) per cent. ad valorem. Your ascertainment, liquidation, and exactions as aforesaid, are submitted to under compulsion, and we pay said illegal exactions only for the purpose of obtaining or retaining possession of our goods, and we claim a refund accordingly. You are hereby notified that
40 this protest is intended to apply to all future similar importations, and that the duplicate protest, which is herewith submitted for transmission by you to the Secretary of the Treasury is our appeal to him from your decision against this protest and also from your exaction on all such entries in future as fully as if formally made on each entry thereof, and this protest is expressly hereby made to apply to all similar future exactions. In the event that you shall not yet have made your final decision on any of our said entries or respecting said exactions, you are hereby notified to read

this protest, then in your office, upon rendering final decision, of which you are hereby requested to notify us.

The statute requires that the importer's protest shall set forth "distinctly and specifically the grounds of his objection" to the liquidation of duty. The objection alleged in the protest may be dependent on facts; or it may be an objection on legal grounds, the facts being free from dispute. If the objection is dependent on facts, the statute requires that the facts which form the basis shall be distinctly and specifically set forth, so that the collector shall not be allowed to act in ignorance of any facts on which the importer may claim to recover back the duty paid. If the importer claims exemption on the ground that in law his import has the right of entry free, he should set forth or refer to the law sufficiently to inform the collector what provision of the law grants his goods that exemption. If the collector has in his mind a clause of the tariff act which he believes is applicable, and the importer has another in his mind that he believes should be applied, unless the importer informs the collector what clause he claims under, the collector has no
41 opportunities to judge fairly the cause which he is to decide. The importer must put the collector in possession of his side of the case, or he is debarred from the right to dispute the judgment of the collector, and this must be done distinctly and specifically.

It is claimed this is not done in the protest under consideration. Its language, "claiming that said merchandise is not dutiable, as charged, at the rate of 20 per cent. ad valorem or at 10 per cent. ad valorem," does not state any grounds for the claim at all. The next clause must state the ground, if any is to be found. It is, "We claim that said merchandise should be admitted free of duty, and if not free, should not be charged with duty at a rate greater than ten per cent. ad valorem."

This is but an allegation that it should be admitted free, without any reason why. It might be the importers claimed it should be admitted free from the fact they were imported for the Agricultural Department.

It might be they proposed to establish as a fact the importations were beans of a rare kind, not grown in the United States, and were imported expressly as such, or that they were not such beans as are usually planted in gardens; or that by a clause in the free list they were exempt as seed.

No information at all was given which would direct the attention of the collector to the ground on which the exemption from duty was claimed. To render the ground of exemption still more dubious the protest claimed that the goods should be taxed neither at 20 nor 10 per cent., and by the next clause of the sentence claims that if not admitted free they should be taxed only 10 per cent.

42 The requisites of a protest are well stated in Elmes's Law of the Customs, section 714, as follows:

SEC. 714. They must, however, be so specific in character that when fairly construed they will show that the objection taken at the trial of the suit was in the mind of the importer at the time of

making the protest; also that they draw the attention of the collector to the substance of the objection, to the end that he may cure the defect, if any exists. A mere protest against the payment of the duty exacted is not a compliance with the statute, and is therefore insufficient. The importer must do more than this, as is evident from the language of the statute. He must make a clear, distinct, and positive statement of the ground of his objection to the exaction sufficient to notify the collector of the true nature and character of the complaint against him, in order that the officer may be able to ascertain the precise facts, and to correct the mistake, if one has been made, before it is too late to correct it, or before, it may be, the officers or persons who participated in the transaction are dead or beyond reach, and while the evidence is attainable to confirm the decision, if it is correct. The protest should be, and is required to be, so distinct in stating the ground of objection, that, at the trial of any suit which may ensue for a recovery, it shall definitely appear that the complaint and the ground thereof were patent at the time of protest, and not the result of an afterthought.

A foot-note to this quotation gives references to substantially all the decisions reported bearing on the question.

In the case of *Frazee* vs. *Moffitt* (20 Blatchford, 269) it is ruled:

A mere protest against the payment of the duty exacted is not a compliance with the statute.

43 In the case of *Thomson* vs. *Maxwell* (2 Blatchford, 387–'8) one of the protests was:

We also protest against paying add. duty and penalty, the goods being appraised (259, 260) too high; we claim to have $174.80 refunded. * * *

The other protest was:

The plaintiffs wrote on the entry: "We hereby protest against the payment of 30 *per cent.* duty charged on all cotton and worsted shawls contained in this entry, claiming to enter the same at 25 *per cent.* We pay the amount exacted, in order to get possession of the goods, claiming to have the difference refunded."

The court ruled (p. 392):

Testing by this rule the protests put in by the claimants in this case, it is obvious that they afford no indication to the collector that he or the other officers of the customs had committed any irregularity in the mode adopted for ascertaining or imposing the duties demanded. We accordingly lay out of view all the allegations made on the argument respecting the regularity of the proceedings at the custom-house preparatory to an appraisal of the goods, and the competency of the oath administered to the appraisers, and the necessity that all the appraisers should act together in examining the goods, and the sufficiency of the report made by them to the collector, or of his directions to them, or of their memoranda upon the invoices or the entries. The protests specify none of these particulars, and the claimants must be held to be debarred of all objections which are not distinctly and specifically pointed out in

the protests or made certain by the papers which accompany them.

44 In the case of *Arthur* vs. *Morgan* (112 U. S., 501) it is ruled:

A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party, and was brought to the knowledge of the collector, so as to secure to the Government the practical advantage which the statute was designed to secure.

The protest in this case by the last clause quoted made it an alternative one. It is:

"And if not free should not be charged with duty at a rate greater than ten per cent. ad valorem."

The duty in excess of the 10 per cent. was refunded before judgment. The protest at best claimed they should be free, or taxed at 10 per cent. This gave two alternatives to the Government. One of the alternatives offered by the plaintiffs below was accepted, and, under the protest, the plaintiffs cannot lawfully ask more.

II.

The remaining question is, Were the goods on the free list? For if not on the free list, as they were taxed at the alternative rate fixed in the protest, it is immaterial whether that rate was right or wrong. First, because the importer cannot recover on any other ground than that set forth in his protest (*Davies* vs. *Arthur*, 96 U. S., 148); second, because the general rule is that all imports from foreign countries shall be taxed. The exceptions to the rule are set forth in the free list, which is an express statutory exception, and all non-enumerated articles not excepted are provided for in the similitude section (2499, R. S.).

45

The imports involved in this case after the refund were classified as vegetables under the first of the following clauses of Schedule G (22 U. S. Stat., 504):

Vegetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem.

Vegetables, prepared or preserved, of all kinds, not otherwise provided for, thirty per centum ad valorem.

The importers claimed on the trial the merchandise should have been admitted free, under the following clause of the free list (22 U. S. Stat., 520):

Plants, trees, shrubs, and vines of all kinds, not otherwise provided for, and seeds of all kinds, except medicinal seeds, not specially enumerated or provided for in this act.

The clause which immediately succeeds this in the free list is—

Plants, trees, shrubs, roots, seed cane, and seeds imported by the Department of Agriculture or the United States botanical garden.

This last clause throws some light on the former. It shows that when "seed" is used as an adjective, as in "seed cane," and not as a noun, the article is not embraced in the word "seed" as used in

the statute, for the words "seed cane" and "seeds" are used together in the same clause, implying that "seed cane" is not embraced in the word "seed."

The inference is that when a vegetable product which has
46 a specific name may be used as a seed, or may not, the legislature made the distinction by using the word "seed" as an adjective and excluded all imports of the article that were not imported as and intended to be used for seed.

As the word "seeds" is used in both clauses, it affords the inference that its first use was not intended to cover all things that contained the "principle of production," which is the broadest definition given of "seed," and that when an article has another name, as and apple, a banana, a potato, or a cone, although it might be the original source of production, it was not intended to be embraced in the word "seed." The word "vegetable," in the first clause quoted, is not used in its broadest sense, or it would include all the products of the vegetable kingdom. It, from the association in which it is found, clearly shows that it was intended to embrace the articles included in the word as it is commonly used, which is such portion of the vegetable kingdom as is cultivated for the table; or, as stated by Worcester, "vegetables, as the term is commonly used, are such plants as are cultivated for the table."

And he defines plant as "any vegetable production produced from seed." The word "vegetable," as used in the clauses quoted, clearly embraces not the leaves and the stem only, but the berry, the bean, the cucumber, the peach, and the apple, for it refers to such edibles as are intended to be embraced in the phrases and words "a state of nature," or "in salt" or "brine," or "prepared or preserved."

We contend that the word "vegetable" is used in the common
acceptation, and includes such vegetables as are cultivated
47 for the table. If the very same vegetable is used exceptionally and in comparatively small quantities as a seed, but generally as an edible, such exceptional use does not affect the general rule. The common language of the people makes the distinction by using the word seed as an adjective, and the name of the vegetable with it as a noun, where the main use is as an edible and the exceptional use as a seed, when the latter is intended to be described—as, seed wheat, seed rye, seed buckwheat, seed beans, seed potatoes, seed cucumbers, etc. It was proven that, of the beans produced and imported, from 97½ to 99 per cent. are used as an edible, and from 1 to 2½ per cent. as seed. (Rec., pp. 22, 24.)

On the trial, the defendant, as set forth in the second specification of error, offered to prove what was the common name applied to the import when used as an edible. This was rejected by the court.

As shown by the third specification of error, the court refused to charge that if the import (edible beans) was neither commercially nor commonly known as seeds, their verdict should be for defendant. As the protest, if sufficient (which is denied), specifically referred to the word "seeds" on the free list, this point should certainly have been affirmed; for the cause must turn, not upon what

the defendant had adopted as the true classification, but rather on what the plaintiff alleged it to be in his protest. (*Davies* vs. *Arthur*, 96 U. S. R., 148.) For if neither commercially nor in common language the import was known as seeds, the court interpreting the statute should have defined the word either from its commercial or its common acceptation. It refused to do either.

48 If the import was not enumerated, then the defendant's second point should have been affirmed, which is:

Also, that if the jury find that the imported articles are not designated or enumerated in the tariff act, and that they bear a similitude to vegetables, either in material, quality, texture, or the use to which they may be applied, then their verdict should be for the defendant; which request was denied or refused by the court, and to which ruling defendant's counsel duly excepted (Rec., p. 26).

Section 2499, Revised Statutes, declares:

There shall be levied, collected, and paid, on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid, on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which *at* any of its component parts may be chargeable.

The imports involved in this case, in material, quality, *and use*, are more nearly similar to vegetables than to any other; but in any event it should have been submitted to the jury.

As shown in the seventh specification of error, the court
49 ruled that neither the commercial designation nor the name "bean" had anything to do with the question.

This seems to have closed almost every possible avenue of truth which had not before been excluded from consideration, from which the jury could have reached a legal result, and limited the possibility of reaching a lawful conclusion to the narrowest limits.

In addition to this, the court directed the attention of the jury to a false issue instead of the true one, in the following sentence of the charge (Rec., p. 26):

This is the only question of fact—are they or are they not vegetables in the ordinary and usual definition of the word?

The protest, as interpreted by the evidence on the trial, showed the plaintiffs claimed the imports were seeds. The question for the jury to determine, as indicated in defendant's first point was, Were the imports seeds? and not, Were they vegetables?

G. A. JENKS,
Solicitor General.

50 Office Supreme Court U. S. Filed Jan. 11, 1889. James H. McKenney, clerk.

United States Supreme Court.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK,
Plaintiff in Error.

against

LOUIS A. SALOMON AND CHARLES SALOMON,
Defendants in Error.

October Term, 1888.

No. 446.

BRIEF FOR DEFENDANTS IN ERROR.

JOSEPH H. CHOATE,
HENRY EDWIN TREMAIN,
MASON W. TYLER,
For Defendants in Error.

51 Supreme Court of the United States, October Term, 1888.

WILLIAM H. ROBERTSON, Collector of the Port of New York, Plaintiff in Error,
against
LOUIS A. SALOMON and CHARLES SALOMON, Defendants in Error.
No. 446.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

This cause was advanced for argument on motion by the Government as a representative suit satisfactorily presenting for final determination a controversy coexistent with the present tariff, respecting the exemption from duty, as in the court below decided, of imported seeds of the field bean plant, which had originally been assessed with duty at twenty per cent. *ad valorem*.

Payments having been made under the usual protests, an action at law was instituted in the State court, and after its removal by *certiorari* into the United States circuit court a jury trial was had, which terminated in a verdict for the importers. This result,
52 the defendants in error claim, could not properly have been otherwise in view of the incontrovertible testimony completely describing the merchandise, and of the statute applicable to the state of facts thus shown.

The phrase of the free list of 1883, under which the merchandise is claimed to be exempt from duty, reads: "Seeds *of all kinds*, except medicinal seeds, not specially enumerated or provided for in this act."

This phrase has received judicial interpretation by this court in the case of *Ferry* vs. *Livingston*, 115 *U. S.*, 542, where certain seeds which were found in fact not to be garden seeds were declared to be exempt from duty within its terms, while other seeds which were found in fact to be garden seeds, were held dutiable as such at twenty per cent. This decision necessarily followed the findings of fact upon which it was based, and eliminates from the present case any further consideration of the application of the words "except medical seeds," as found in the statute. It specially interprets them, however, as stated in point I, and leaves for solution in the case at bar the single issue, whether the *particular seeds* in controversy are or are not elsewhere "specially enumerated as provided for" in the tariff of 1883. That the articles are "*seeds*" of *some* kind is incontestable What particular *kind* of seeds they are, and whether otherwise enumerated, and if so, how and where, is the only residuary question. The use of the article is no factor in the case.

Seeds in great variety, and which are used in various ways, are mentioned in the schedules of the tariff of 1883. They are described sometimes by name, at other times according to their special

adaptations, their general uses, their condition of manufacture, or according to some other characteristic feature distinguishing them for revenue purposes. These methods of classification are common to all tariffs, except that the changes in tariff language
53 and terms successively correspond to the modifications in rate classification or exemption intended by Congress to be effected. The clauses hitherto claimed by the Government to bear upon the present case are the following:

Schedule N. * * * "Garden seeds, except seed of the sugar-beat twenty per centum *ad valorem*." (Tariff Index, new par., 465; U. S. St. at L., vol. 22, p. 513); and Schedule G. * * * "Vegetables in their natural state, or in salt or brine not specially enumerated or provided for in this act, ten per centum *ad valorem*" (*Ib.*, par. 286, *Ib.*, p. 504). The importers insisted that the merchandise was *not* "garden seeds." This fact, after a long controversy, was in 1885 conceded by the Treasury Department. Simultaneously it was officially discovered that instead of being *seeds*, as previously conceded, these importations were *vegetables*. Hence the actual distinction between a *vegetable* and the *seed* of a vegetable has become a matter for judicial determination.

As stated by the court in its charge to the jury, "the collector levied a duty of twenty per cent. as garden seeds. That rate of duty was paid under protest, the plaintiff insisting that the article was duty free as seeds not otherwise provided for, and *if not seeds* they were dutiable at ten per cent. The Treasury Department has receded from its position that the articles were garden seeds, and has directed a refund of ten per cent. so that the only question before you is whether they should have been admitted duty free as seeds, or should have paid a duty of ten per cent. as vegetables. White beans are unquestionably the seeds of the field bean," etc., etc., etc.

It was, nevertheless, then left by the judge as "the only question of fact" (?) for the jury to determine, whether the merchandise *was* "seeds" or "vegetables" (Rec., fols. 65, 66).

In the course of the testimony there was no contradiction
54 of the proposition that "vegetables are the edible roots and tops of plants as distinguished from their dried matured seeds" (Rec., fol. 27). This, indeed, is common knowledge. So is the fact without contradiction that the plaintiffs' importations were "the seed of the plant from the field bean" (fol. 27). As commercial commodities, also, vegetables are distinguished from seeds. Some of the staple seeds dealt in as commercial commodities are flaxseed, hemp seed, rape seed, lentils, clover seed, mustard seed, anise seed, coriander seed, quince seed, and a great many more, all used for various purposes; while potatoes, onions, cabbage, cauliflower, beets, carrots, and other similar commodities illustrate the vegetables of commerce (fols. 26, 30). So the green bean, containing the immatured seed, not, however, in the same state as the plaintiffs' imported beans, is distinguished, like the string bean, from the *seed* itself. "The term 'seed' has no special signification in trade" (fol. 28). It is a general or popular term. "Different

seeds have different uses, manufacturing and other uses" (Rec., p. 13); "and others are edible, *e. g.*, lentils, barley, wheat, rye, beans, oats, cotton-seed, coriander seed," etc. (pp. 11–13).

The theory that no commodity is a seed except its use is exclusively for propagation is thus destroyed by common knowledge, as well as by commercial experience. Moreover, "the propagating elements are still there" (in plaintiffs' articles, fols. 42, 38 and 58). The term "seeds" being a general one, is inadequate to identify an individual commodity, and therefore is in trade very seldom used; a more particular description by name or purpose being requisite for mercantile designation (fol. 29). A seed is "a product of a plant by which that plant is propagated. A seed, when it is of certain plants, is largely used for food as well as propagation, and in that condition a seed is an article of commerce for both purposes. * * * When speaking of the commercial
55 name of this article being *beans*, that is a general term that describes all seeds of the bean plant, and it is so accepted in commerce, I should think," says one witness (fol. 48). Particular beans have particular names (fols. 47–48, and see Appendix). Some seeds are used for propagation as well as for other purposes, "as, for instance, beans, pease, corn, to some extent, wheat, and pease of various kinds used for the purposes of food and manufacturing," said the chief witness for the defense (fol. 53). He was confirmed by the next witness, who declared that there was no special signification in trade of the term seeds that differed from its ordinary acceptation of anything from which a plant can be grown (fol. 56).

Then in disposing of the discarded Government theory that the seeds in question were garden seeds, witnesses on both sides (fols. 43, 44, 45, 49 and 56) agreed in describing the methods of cultivation in this country and in Europe. It was not the fact that beans like these were raised in gardens to be used otherwise "than in the green state, because they require more room;" * * * "one could not raise enough of them in that way to make it an object" (fol. 57). As commodities they are otherwise produced. They are grown in large fields where the ground is prepared for them, as it is for corn. They are raised in hills or drills, the bushes growing 1½ to 2 feet high, producing when matured a flower, which forms a pod, and in the pods are the bean. They are ripened in the sun, pulled off by hand or machine, dried, threshed, screened, picked over, assorted, and then sent to market; or, in Hungary, collected by merchants of the villagers. In New York State this field cultivation is very extensive (fol. 46).

There being shown no difference between the commercial usage and common knowledge touching the actual distinctions characterizing vegetables and their seeds, an analytical chemist ex-
56 perienced also "in botany and *in general merchandise*," stated the actual distinctions recognized the world over between vegetables and their seeds; explaining that edible plants contained from 80 to 90 per cent. of water, while seeds contain only from 9 per cent. to 13 per cent. of water. After explaining other actual distinctions recognized by standard authorities (see appendix here-

to), he sums them up in stating that the mature seed is dried, and is a *different* product from the vegetable—the plant itself (fol. 36). "Seeds are the products of plants containing principally starchy matters, albuminoids, and from nine to thirteen per cent. of water" (fol. 34). The propagating elements are still in these seeds, which are dried, but not kiln-dried; that might destroy the germ (fol. 38).

In the light of testimony of the foregoing character, the claim that these bean seeds were classifiable as "garden seeds" necessarily disappeared.

In 1885, when receding from the erroneous garden-seed classification, however, the Treasury Bureau again went astray. It completely reversed itself in the effort to escape the free list. It ceased to distinguish between the *seed* of the vegetable and the vegetable itself; and erroneously, as the importers insist, classified them together.

In March, 1884, however, the Secretary's order had truthfully declared "*beans of the kind or in the form of the article in consideration as an article of commerce*, ARE NOT VEGETABLES. *They are the seeds of the bean plant, which latter is a vegetable.*"

The same order further observed, "Beans are spoken of by that name in but three places in the tariff act (T. I., new, para. 94, 636 and 808); not one of those paragraphs touches the article now in consideration. Paragraphs 94 and 636 speak of (beans not edible), while this article is edible. Paragraph 808 speaks specifically of Tonquin, Tonqua or Tonka beans, and they are not this
57 article. These goods not being spoken of by name in the tariff act they are not specifically enumerated or specifically provided for thereby."

The importers, therefore, insist that the articles are seeds (not medicinal) not specially enumerated or provided for in the schedules of dutiable merchandise.

From the foregoing statement will readily be deduced two inquiries: *First*, whether the merchandise, upon the undisputed and incontestable facts arising from its physical description is not of the class of seeds, and therefore free from duty as seeds not specially enumerated as subject to duty. *Second*, whether, after the court had permitted this inquiry to be submitted to the jury, the conclusion to which the jury arrived should for any reason be disturbed.

Should the first inquiry be answered favorably to the defendants in error, the judgment will, of course, be affirmed.

In answering the second inquiry, it will be observed that the submission to the jury was indeed more favorable to the collector than the testimony itself warranted; and that it left the jury to draw unjustifiable inferences which would abrogate the actual and common distinctions between vegetables and their seeds, and thus substitute instead of the actual distinctions as testified to, a meretricious distinction argumentatively assumed to exist in trade, but not sufficiently established to avail the defense under the principles of revenue administration as frequently expounded by this court.

The defendants in error insist that either upon the undisputed facts, or under the submission as charged, assuming a wide contra-

diction of testimony (which there is not) the verdict should not be disturbed.

The single exception to the charge stating that the name by which "the article is called in trade and commerce has nothing to do with the question," should be considered, if at all, in connection with the whole charge, and particularly with the paragraphs reading:

58

"It is conceded, and I charge you, that a term employed by Congress to designate an article as the subject of duty is to be understood in its *ordinary commercial sense*, rather than its technical or scientific meaning, *where they differ*.

I charge you furthermore, as requested by the plaintiff, that as various kinds of seeds are used for various purposes and have various names, the circumstances that these articles are edible and as a commodity are a staple article of food is not controlling.

Nor does the fact that the articles are known as beans or white beans or dried beans withdraw them from the classification of seeds, *if they are seeds;* and if you believe from the testimony that vegetables are the edible roots or tops of plants as distinguished from their dried, matured seeds, then your verdict will be for the plaintiff" (fols. 67–68).

Under this liberal submission to the jury, a verdict having been rendered for the plaintiffs, it is now submitted that the judgment is without error and should stand.

In so far as errors are assigned, the exceptions taken by the Government are discussed in the following:

POINTS.

I.

No controversy of Tariff Interpretation. The clause "seeds of all kinds except medicinal" already interpreted.

In Ferry *vs.* Livingston, 115 U. S., 542, this court adjudicated the meaning of the clause under which the verdict in the case at bar was rendered. This interpretation coincides with the interpretation which it has uniformly received in Treasury instructions.

59

This interpretation is that "THE PROPER READING" of the phrase in the free list "seeds of all kinds, except medicinal seeds not specially enumerated or provided for in this act" is that "*it includes seeds of all kinds (other than medicinal seeds) which are not specially enumerated or provided for in the act*" (*Ib.*, 549).

Seeds of many kinds *are* specially enumerated or provided for in the act, *e. g.*, garden seeds, aromatic seeds, seed of the sugar beet, and a variety of agricultural, medicinal, manufacturing, edible and other seeds. Thus the Treasury, as early as November 27, 1883, decided that certain cabbage and beet seeds which were *not* garden seeds came within the foregoing category of "seeds of all kinds ex-

cept medicinal seeds not specially enumerated or provided for," and as such were exempt from duty (see Appendix A to this Brief, 6046, and 30 Int. Rev. Rec., 24). Of course, this instruction contemplated a possible dispute of *fact* as to whether any particular seed belonged to the category of garden seeds or not; but the construction of the statute accorded with that subsequently declared by this court. It is noteworthy, however, that the department in that order regarded "seeds such as barley, beans * * * clover, corn, * * * oats, onions, potatoes * * * rye, * * * wheat, *and other like products*," as belonging to the *category* of exempt *seeds* in the free list of 1883.

The case of *Ferry* vs. *Livingston*, this court declares by the opinion, rested "for decision on the facts found" (it was tried by court without jury), so that "it is not possible for this court to lay down any general rule which will apply to cases differing in their *facts*" from that case.

As to the construction of the *law*, however, that is settled.
60 There does not appear to have been any practical difficulty of administration in distinguishing imported "*garden* seeds" from the *field* seeds and other seeds; and the case at bar illustrates the actual termination, as well as the facility of future disposition, of any such possible controversy.

In regard to the proper interpretation and application of the statute concerning the classification of various kinds of seeds there seems, therefore, to be no question of law between the importers now present and the Government.

"Seeds" they are under the importers' claim. As "seeds" they were originally classified and assessed by the Government. If seeds they *actually* are, then *Ferry* vs. *Livingston* indicates their exemption as seeds of a kind (*i. e.*, of the field bean) not specially enumerated. Hence, in the case at bar, there is no issue respecting the statutory construction of the phrase "seeds of all kinds, except medicinal seeds, not specially enumerated or provided for in this act."

II.

Any possible issue of fact fairly settled by the verdict.

If, in any view of the case, an issue of *fact* may be justly inferred from the testimony, that issue has been settled. The verdict has determined that upon the testified description and physical exhibition of the merchandise it belongs to the class of "seeds" other than medicinal, and not to the class of "vegetables."

The testimony of plaintiffs' first witness, as stated at page
61 11 of Record, not only justifies this conclusion of the jury, but is not found controverted or impaired by anything in the record.

A produce merchant of extensive experience with "seeds" and "vegetables" as commercial commodities, distinguished the plaintiffs' merchandise when exhibited (Exhibits 1, 2 and 3) as "seeds"

and *not* "vegetables," and showed the entire vegetable product (Exhibit No. 4), which was the green bean containing the germ within it, to be the "vegetable" itself, as distinguished from its "dried matured seeds" (Rec., page 11). Thus a fact of common knowledge was explained to be the truth in respect to commercial usage. While it is true that the exigencies of merchants sometimes result in peculiarities of trade usage which do *not* correspond with the common knowledge of the people, courts always require clear proofs of such peculiarities before taking them into account, else there would be no certainty in the law.

The evidence exhibiting a clear correspondence between common knowledge and trade usage, it was very liberal to defendant to leave the classification of the merchandise to the jury.

Hence for all legitimate purposes upon this writ of error the *fact* will be assumed as found by the jury that the imported merchandise was "seeds" and not "vegetables."

In behalf of the defendants in error here, it is respectfully insisted that this issue was very broadly and most favorably to the Government submitted by the court to the jury.

The court below charged, * * * "Are they or are they not vegetables in the ordinary and usual definition of the word. If they are—as white beans are undoubtedly used vastly more for purposes of food than of seeds—they are dutiable at 10 per cent. * * * The plaintiffs rely upon the uncontroverted fact that they are seeds. * * * If you believe from the testimony that
62 vegetables are the edible roots or tops of plants as distinguished from their dried matured seeds then your verdict will be for the plaintiff-" (fols. 66–68).

What more upon the evidence could the collector fairly require from the court? Lest this simple issue might not cover the entire law of the case, the court, in response to the respective contentions during the trial, adopting substantially the explanatory propositions prayed for by both parties, further instructed the jury that: (1) A term employed by Congress to designate an article as the subject of duty is to be understood in its ordinary commercial sense rather than its technical or scientific meaning where they differ. (2) As various kinds of seeds are used for various purposes and have various names, the circumstances that these articles are edible and as a commodity are a staple article of food is not controlling. (3) As to the *name* "bean"—"the fact that the articles are known as beans, or white beans, or dried beans does not withdraw them from the classification of seeds if they are seeds. And *if you believe from the testimony* that vegetables are the edible roots or tops of plants, as distinguished from their dried matured seeds, then your verdict will be for the plaintiffs" (Rec., fols. 66–69).

These quotations suffice to indicate a charge covering all the law applicable to the issue submitted. No further instructions in aid of that issue appear by the record to have been sought for; while a more comprehensive and liberal submission—as far as the defense is concerned—can scarcely be imagined.

At all events, the instruction of the court "was clear and accu-

rate, and it *covered the entire ground of the controversy.* Nothing more was necessary to be said. No amount of verbiage would have improved it. The jury could have had no difficulty in applying it intelligently to the facts before them" (quoting from SWAYNE, J., in *Recknagle* vs. *Murphy*, 102 *U. S., p.* 199). To this the additional quotation is equally pertinent.

63 "It is needless to notice, specifically, the several assignments of error. They relate to the instructions given, and to several asked for, * * * and refused by the court. As regards the former, we have expressed our approval. If the latter were in conflict with it, they were properly refused for that reason. Conceding that they were correct, the instruction given was sufficient for the case. Nothing more could, therefore, be required of the court" (*Ib.*, 200).

It is, therefore, confidently submitted that the only possible issue of fact has been fairly and finally determined in the verdict.

III.

Tariff Descriptions—How Applied.

This is not a case where the descriptive phrases in the tariff can properly be subjected to the usages and demands of trade. The interpretation of "words of common speech" is "within the judicial knowledge, and, therefore, matter of law" (Marvel *vs.* Merritt, 116 U. S., 12). This rule is well settled, and its application illustrated in numerous adjudications.

The principle is thus stated by WAITE, Ch. J.: "While tariff acts are generally to be construed according to the commercial understanding of the terms employed language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown" (Swan *vs.* Arthur, 103 U. S., 597); and by STRONG, J., in Greenleaf *vs.* Goodrich, 101 U. S., 284: "While it was true that where words of art or phrases are novel or obscure, as in terms of art, it was proper to explain them by reference to the art or precise science to which they were appropriate, the

64 rule was not so when the words or phrases were familiar to all classes, grades, and occupations; and that the popular or received import of words furnished the general rule for the interpretation of public laws as well as of private transactions." "It must then, in any case, be shown that the legislature designed a departure from the natural and popular acceptation of language" (citing Maillard *vs.* Lawrence, 16 How., 251). In the case at bar the contrary is shown; the trade meaning and popular import correspond (Rec., fols. 56, 54, 28, 29, 27). Tariff language is always understood to have the same meaning in commerce that it has in the community at large, unless the contrary is shown (Schmieder *vs.* Barney, 113 U. S., 645).

The only tariff words to be interpreted or applied in the case at bar are "seeds" and "vegetables."

The "novelty" or "obscurity" to the judicial mind of these terms will scarcely justify resort to mercantile witnesses. Trade usages will not identify them. They are common popular nouns, descriptive of a class, each member of which class is individualized by a particular name. Many *vegetables* and many *seeds* are thus particularized for tariff purposes. Those not in some way specially denominated fall among the residuum of their class, the non-enumerated vegetables by themselves at ten per cent., the non-enumerated *seeds* by themselves, free. Neither group falls within the classification of the other under any principle of fact or rule of law.

Common speech, dictionary meaning, scientific distinctions, natural philosophy, English philology, and the usage of commercial dealings, correspond with remarkable uniformity, in defining the words "seeds" and "vegetables."

Nor is this uniformity of definition disturbed because as the result of culinary art a New York Boniface prints "beans" on his bill of fare!

How such dishes are *known* was excluded under the Govern-
65 ment's four solemn exceptions (Rec., fols. 60 to 63), lest the answer might reveal culinary secrets, or provoke renewed Treasury "ambiguities." The answers of the restaurateur would afford the jury as accurate information on the point at issue as the *menu* of the French *chéf* does the diner.

Yet the Government specifies (2) error because the *the* table names for "baked beans," or beans otherwise cooked, are not amplified by the testimony of caterers. The record shows (p. 24) that the court had already permitted defendant to exhaust that line of possibility; and no authority is cited against the rulings assigned as error.

As distinguishing between two kinds of food we may speak of meat and vegetables, meaning the products respectively of animal or vegetable life; but even in this way the edible dried seeds would not in ordinary parlance be particularly distinguished. It would be the *plant* or its fruit, as the onion, potatoe, cauliflower, the entire bean or squash, or edible root or top itself.

"Vegetables" and "seeds" do not belong to a special vocabulary requiring mercantile definitions. The record in the case at bar is a presentation of that which is common knowledge. The term "*vegetable*" *describes something more than its seed.* A vegetable derives its existence and contains the power of propagating itself from its seed. The seed is not the vegetable. The seed is the rudiment of the plant. It is not the plant. The vegetable is not the seed. A child distinguishes between them. The Treasury Department fails to perceive the distinction. In its efforts to escape the free list it discovers "ambiguity" and appeals to this court to relieve its embarrassment of administration.

Mr. Justice MATTHEWS says: "Where the words are used in an act imposing duties upon imports, which have acquired by commercial use a meaning different from their ordinary meaning, the latter may be controlled by the former, if such be the appar-
66 ent intent of the statute. But the application fails * * *

because the statute is unequivocal; there is no reference in the statute, either expressly or by implication, to any commercial usage, and *there is no language in it which requires* for its interpretation the aid of any extraneous circumstance" (Arthur *vs.* Morrison, 96 U. S., 108). The same judge further declared, and in harmony with repeated adjudications in this court: "The words used are not technical, either as having a special sense by commercial usage, nor as having a scientific meaning different from their popular meaning; they are the words of common speech, and as such the interpretation is within the judicial knowledge and, therefore, matter of law" (Marvel *vs.* Merritt, 116 U. S., 11).

In Lawrence *vs.* Merritt, 127 U. S., 113, the judge below had charged the jury: "I do not think the words used in the statute have any technical meaning. You must take the statute as you find it, *and a common-sense view of the case*, etc., etc., etc.; and this court affirmed the charge.

IV.

Individual trade names inconsequential here.

Designation by terms of common description of commodities for tariff purposes is equally adequate with description by mercantile name. Congress selects the language it prefers; and neither the courts nor the Executive are at liberty to divert its obvious meaning. Moreover, the judiciary should encourage common language and common words, by not subjecting either to artificial restraints not in harmony with their natural import.

67 The reiteration in briefs and authorities of the accepted principle—sometimes, however, not carefully stated—that revenue laws are to be construed according to the commercial sense of the terms employed, where commercial terms are employed, has occasioned the mistaken contention that *all* tariff phrases are to be controlled according to the testimony of merchants. This is not so. The *principle is limited* to mercantile, or other *terms requiring* explanation. It has no application to words in our daily vocabulary which courts and juries are bound to understand. If it were otherwise, testimony that an article was *called* in trade by a name not mentioned in the tariff might enable a party to escape a classification under terms which otherwise aptly described his commodity.

The records of this court exhibit some curious but unsuccessful contentions of this character, projected both for and against the Government. The case at bar affords one apt illustration.

The Government contends that because the seeds in question are distinguished *by name* as white beans, that they are not classifiable as *seeds*.

If the commodity in question had been described in the statute according to its individual name, such as, edible white beans, or

more properly, "marrow beans," cleaned for food, or by some other particular name which in trade had become attached to it, there might be force in the contention. The controversy then would be to identify a special article with a special name. The trade usage about the statute name would become a factor in the identification. But if the individual name not found in the statute is to exclude the commodity from one phrase of the statute otherwise apt to describe it, such a name may exclude it from other classifications; and thus may destroy the value of any method of enumeration Congress may adopt, or subject its careful schedules to no end of "ambiguities."

Therefore, in the case at bar, the court properly instructed
68 the jury that because the articles might be known in trade as beans, or white beans, or dried beans, that fact (fol. 68) did not "withdraw them from the classification of seeds, if they are seeds;" and we say the court was right. Were it otherwise, timothy, clover, rye, lentils, wheat, linseed, flaxseed, and other like products might avoid an enumeration under the phrase of "seeds of all kinds" because every seed is distinguished by an individual name. If *name* prevailed over the noun describing the *class* then radish seed could not be dutiable as garden seed, because its known commercial name is radish seed, and it has not the *particular* designation of garden seed.

So cucumber seed has its individual name, and is *not* designated in trade garden seed; so asparagus seed is not *in trade* designated garden seed; so with celery seed, rhubarb seed, parsley seed, and other individual products. Each has its individual or particular trade name.

The existence of some special name has never been held to withdraw a commodity from the tariff class to which under terms of adequate description it otherwise belongs.

V.

Use of these seeds no factor. Origin and administration of the tariff clause under consideration.

As one error begets another so the effort to render the word "beans" the controlling factor for duty classification has occasioned the necessity of artificially restricting the word seeds to seeds which are exclusively used for propagation. The attempt to sustain
69 this restriction by the testimony of seedsmen utterly failed when the witness called for that purpose identified edible beans like those in question as the seeds he sold; adding that the *use* of the seed sold was not inquired about; and that "the term seed did not mean anything peculiar and different in trade than it does out of the trade" (Rec., fol. 54).

Nor does the use of the seed affect its classification. When the tariff classifies seeds or any other commodity according to its use it says so.

The following instances illustrate:

ILLUSTRATIONS OF TARIFF CLASSIFICATIONS DEPENDENT UPON THE USE OF THE IMPORTED ARTICLE.

Thus:

Sparterre for making or ornamenting hats—free. Braids, tissues, laces, trimmings for making or ornamenting hats, bonnets or hoods, twenty per cent.

Woods for the manufacture of paper, gunny bags, etc., fit only for remanufacturing—free. Types old, and fit *only* to be remanufactured—free. Sticks and canes * * * suitable for umbrellas, etc. (indicating a *general* use as distinguished from an *exclusive* use, which is not uncommon in tariff phraseology)—free.

Glass plate or disks unwrought for use in the manufacture of optical instruments—free.

Grasses and pulp of, for the manufacture of paper—free.

Dyeing or tanning articles in a crude state USED in dyeing or tanning, etc.—free.

Cat-gut strings or gut cord for musical instruments—free; while in another paragraph strings that are not for use in musical instruments are separately classified at 25 per cent.

Household effects, libraries, etc., not intended for sale, etc.—free.

Bamboo reeds * * * for canes, etc.—free.

Animals * * * for purposes of exhibition—free.

Acids used for medicinal, chemical or manufacturing purposes not specially enumerated, etc.—free.

Barks * * * *used* in the manufacture of quinia. Guano, manures and all substances *expressly used* for manure—free.

Bone dust and bone ash for manufacturing phosphate for fertilizers—free.

Osier or willow prepared for basket-makers—free.

70 Gunpowder and all explosive substances used for mining blasting, artillery or sporting purposes, six and ten cents per pound.

Feathers * * * including birds *for millinery* ornaments, * * * and artificial flowers * * * for *millinery* use—fifty per cent.

Lastings, cut and fitted "for buttons *exclusively*" * * * ten per cent.

Sail duck, or canvas for sails, thirty per cent.

Acorns and dandelion root, raw and prepared, and all other articles *used* or *intended* to be used as coffee or as substitutes therefor—two cents per pound.

Hubs for wheels, twenty per cent. Needles for knitting or sewing machines, twenty-five per cent.

Iron and steel cotton ties or hoops for baling purposes, thirty-five per cent.

Iron in pigs, scrap iron, etc. * * * But nothing shall be deemed scrap iron, etc., or refuse iron or steel that has been in actual use and is fit only to be remanufactured. (Here an exclusive purpose or absence of purpose is the basis of classification.)

Coloring for brandy, fifty per cent.

These and other instances illustrate tariff classifications hinging on the *use* of the taxed article; that use being in some instances an essential or exclusive use, and in other instances only a general use.

In every case where *use* is controlling it becomes so because of the language of the statute, and not otherwise.

Thus in the case at bar when "seeds" of all kinds, other than medicinal, and not elsewhere provided for, are mentioned in the free list, there is no justification in limiting the exempted "seeds" to seeds which are used for planting. The exempt seeds include, of course, those used for propagation, for manufacturing, for food of men or animals, for speculation, for science, art, or for any other purpose whatsoever. The exclusive limitation is that the "seeds of all kinds" thus exempted from duty is that seeds which are specially elsewhere more particularly described for tariff purposes, are to be classified under their more exact descriptions, and not under

this residuary and generic provision for all the other "seeds."

71 In the case at bar the *use* is no factor in the classification. A seed is as much a seed when to be used to propagate as to manufacture, or to cook for food, or *for use as forage, or* in the arts, or for medicine.

It is noteworthy that the tariff act includes under the phrase "aromatic seeds" a description of seeds not used for propagation which indisputably indicates that the term "seeds" as used by it included both seeds used for propagation and seeds used for other purposes.

When, therefore, the act says "seeds of all kinds * * * not specially enumerated or provided for" it must mean to include both "seeds used for propagation" and seeds used for other purposes.

Some of the embarrassments of classification under previous tariffs are described and their termination indicated in proceedings before the tariff commission which framed the phrase in the free list under which the verdict below was rendered.

It seems that under successive tariffs the classification of various kinds of seeds has from time to time been changed by Congress. At one time "garden seeds and seeds of all kinds" not specially enumerated were free. At later dates garden seeds were dutiable at one rate, specially described seeds at other rates, while some seeds were free. In the Revised Statutes of 1874 there were upwards of twenty-five different kinds of seeds specified by name and which were used for a variety of purposes, but the classification of a large number of non-enumerated seeds was in terms made dependent on their use "for agricultural and horticultural purposes." This, of course, did not describe seeds for cooking or for the arts or manufactures. To ascertain the use became a troublesome factor in administration, and thus the same commodity became often subjected to two rates of duty.

72 The present legislative phrase (seeds of all kinds except medicinal, etc.) was designed to avoid all such embarrassments, and is the fruition of the following suggestion in the testimony of Appraiser Sturgis: "Pease and beans belong generically to the order of seeds and should be classified under some one of the provisions for seeds; but they are, by a decision of the department, subject to two rates of duty. (1) When they are intended to be consumed as food they are admitted as 'vegetables not otherwise provided for' (10 per cent.), and (2) when imported for use as seeds they are charged with the duty imposed upon agricultural or garden seeds (20 per cent.). Buckwheat belongs as much to the class of seeds as pease and beans, and is quite as much of a vegetable as either. * * * I would suggest that one rate of duty be placed upon *all seeds, except medicinal seeds.* The provisions for '*seeds* for agricultural purposes,' &c., as the phraseolgy of the law is, has led to the decisions of the department which I have just referred to. It seems to me that *seeds*, excepting strictly medicinal seeds, irrespective of the 'purposes' for which they are imported, should be classified at one rate of duty." * * * (See Report of Tariff Commission, vol. 1, p. 493.)

The tariff clause in consideration was not only framed, but was administered in accordance with this advice and explanation until shortly before the trial of this action, when it was determined that *field* seeds were not *garden* seeds. Instead, however, of then exempting from duty these field-bean seeds, the department assessed them at ten per cent., as if the language of the tariff of 1883 was the same as that of 1874, *i. e.*, dependent upon the *purpose* of the seed, and meanwhile proceeded to the trial of the present suit.

If not a pronounced evasion of existing law, this course was directly at variance with the previous opinions and rulings of the Treasury.

In March, 1884, Assistant Secretary French announced in
73 full (see appendix hereto) Secretary Folger's "opinion upon the classification of seed beans." Speaking of beans, Secretary Folger says: "I infer that they are some variety of the seed of the bean plant or vegetable grown in gardens and fields, and intended for food, or for planting or sowing * * * These goods not being spoken of by name in the tariff act, they are not specifically enumerated or specifically provided for thereby. Are they affected by the tariff law by other language therein than that of specific mention? * * * That law speaks of *vegetables*. But beans of the kind or in the form of the article in consideration as an article of commerce, *are not vegetables*. They are the SEEDS OF THE BEAN PLANT, WHICH LATTER IS A VEGETABLE. So paragraphs 286, (the one now contended for by the Government here), 287, and 636, where mention is made of vegetables, do not apply. AS THESE BEANS ARE SEEDS, what does the tariff law say of seeds?" * * * Then follows a discussion of the distinctions possible between garden seeds and field seeds, in which it is conceded that "it is not easy, therefore, to say of any importation on general principles that it is of garden seeds or of field seeds; nor to frame a rule, on general principles and general knowledge, which will always exactly apply. * * * We know that in fact the bean, as a *seed* of the bean plant or vegetable, is planted in the garden, and is largely planted in the field also. In the former case generally to be eaten green in the pod, as a green esculent, though sometimes as with Lima beans, in the form of the seed of the plant. In the latter case, for the production of seed for subsequent planting, and for food in the form of matured seed."

The *use* of this seed of the bean plant was correctly esteemed no factor in its classification which was conceded to be as a *seed*.

So under the proofs in the case at bar, neither the use nor the name of the seed withdraws it from its classification as "seeds."

74 Another illustration of this interpretation occurs in the Treasury order deciding in October, 1884, that "lentil seeds" are free (see Appendix C hereto).

These articles (identical for tariff purposes with the merchandise in the case at bar) are "the seeds of the lentil plants and they are not garden seeds, not being sown in gardens, but *are field seeds, and so fall into the classification* in the provision in paragraph 760 for seeds of all kinds not otherwise provided for, which *are free of duty*.

That they are seeds, and not vegetables, is shown by decision 6273, regarding duty on beans and pease, which states that beans of the kind or in the form of the article then under consideration, as an article of commerce, are not vegetables, but they are the seeds of the bean plant, which latter is a vegetable. *Whether seeds of the character in question are intended for use as an article of food or for planting purposes does not control the question of their classification.* They are still to be classed as seeds regardless of the purposes for which intended. * * * The department decides that lentil seeds are free of duty under paragraph 760."

Thus it will be seen that from a classification free of duty in November, 1883 (as confirmed by the verdict in the case at bar) the Treasury Department without the intervention of Congress assessed in 1884 twenty per cent. on the merchandise represented in this controversy, and the next year, still without legislation, the Secretary changed the rate again to ten per cent., instead of ordering exemption as first decided, November 27, 1883.

If, as decided by this court, in Hartranft *vs.* Wiegmann (121 U. S., 609), duties are not to be assessed on doubtful interpretations, it would seem to be in order to condemn the Treasury legislation, and to order the department to observe a straightforward administration of the free list prescribed by Congress; and thus
75 aid the administration in avoiding a "condition" and *applying* a "theory."

Why should the simple terms in the free list be abrogated by the careless pen of a secretary?

VI.

But as matter of law the evidence showed the merchandise was exempt from duty.

Upon the undisputed facts exhibited from this record, the tariff classification of the merchandise in question is to be determined as matter of law.

There is no issue or controversy or exception in the case over a sufficient description of the merchandise to establish its classification for revenue purposes.

As matter of law the seeds of the field bean plant are free; and the judgment to that effect is correct, regardless of the terms or methods of submitting the case to the jury. The instruction should have been to the jury to find a verdict for the plaintiffs, because there was enough uncontroverted evidence to warrant that course, and no testimony to indicate any other legal possibility. No evidence was offered or excluded which could in any way disturb the primary facts on which the classification depended.

Even under the liberality of the submission by the court, the verdict may be treated here as a verdict ordered by the court upon such evidence as was not in any respect controverted. Against the leading facts as shown which entitled plaintiffs to a verdict, there

was nothing offered by the defendant to impair the plaintiffs' absolute right to a recovery. Hence, as matter of law the ver-
76 dict and judgment should stand.

Commodities confessedly seeds of the bean plant assessed by the Government as seeds of the *garden* bean plant, and shown by uncontroverted testimony to be seeds of the *field* bean plant, cannot lawfully be withheld from classification as "seeds" by assigning some artificial meaning to the term seeds or by denominating as a vegetable that which is the *seed* of a vegetable.

If every ruling specified for error had been made as claimed by the collector, the result would not disturb the illegality of the duty exacted and the plaintiffs' right to a *verdict upon the facts*, undisputed and not sought to be disputed.

In any aspect of the case, therefore, the judgment should be affirmed.

VII.

Clauses respecting non-enumerated articles of import inapplicable to the case at bar.

This is not a case where the commodities are to be assessed because of their possible similitude to some enumerated article, or where two rates of duty are equally applicable, because in the case at bar the articles are actually enumerated, being in truth seeds, and being found by the jury to be seeds. "Seeds of all kinds" other than medicinal not elsewhere provided for is a special enumeration of all such seeds as are not found more particularly mentioned elsewhere in the tariff. Articles thus comprehended *are* "enumerated." The tariff provisions applicable to articles *not* enumerated have no application to commodities comprehended within this described enumeration.

77 Until it shall be determined, therefore, that the commodities in question are not "seeds" of any kind, or that if they are seeds of *any* kind they are not elsewhere enumerated in the statute, there is no propriety in considering them as non-enumerated. The aim of the statute is to classify articles of the description mentioned, and to subject them according to that description to the particular exemption or tax thus imposed. When the commodity corresponds to any such specification (which may be a particular or a general specification) it becomes an *enumerated* article, and the provisions of the statute applicable only to non-enumerated articles have no application.

Were this otherwise, the simple *existence of any controversy* over the identity of a commodity with a revenue description would enable officers and courts to treat it as non-enumerated, and thus in practice to destroy classifications established by the tariff schedules.

So in the case at bar, the articles were either dutiable as vegetables or free as seeds. As the court told the jury, "the only question before you is whether they should have been admitted duty free as seeds, or should have paid a duty of ten per cent. as vege-

tables" (Rec., fol. 65). Therefore there was no propriety in resorting to tariff clauses or to phrases applicable exclusively to *non*-enumerated articles. To have complied with defendant's requests (fol. 64) in this regard would not only have confused the jury, and misled them from the actual issue, but would have been error. *The articles were enumerated* under one or other of the tariff clauses mentioned, and as was declared by this court, in Hartranft *vs.* Langfeld (125 U. S., p. 128), and many prior cases, in such instances, the provisions as to non-enumerated articles do not apply.

Moreover, *upon the evidence in the case*, as exhibited in the record, the jury were not at liberty to find that the plaintiffs' articles are
78 *not* enumerated or provided for in the tariff acts by either the designation of "seeds, garden seeds, or vegetables;" and instructions of tha- character were for similar reasons properly refused.

As to the prayer that the articles might be found to be "commercially known as garden seeds," the propriety of its refusal is obvious. There was no testimony whatever to that effect. The impropriety of such a classification had been recognized by the defendant. No such claim had been made or evidence given to support it either to the judge or jury; and the instruction of the court that "the Treasury Department has receded from its position that the articles were garden seeds, and has directed a refund of ten per cent., so that the only question before you is whether they should be admitted duty free as seeds or should have paid a duty at ten per cent. as vegetables" *was not excepted to.* This statement and the record of the issue are conclusive.

Given a current exaction of ten per cent. duty as vegetables, a judicial determination that the articles are free, and the avowed embarrassments in administration requiring the advance on the docket of this particular issue (as stated in the Attorney General's motion papers to be "to facilitate the administration of the customs revenue by an early authoritative construction of the law"), the defendants in error are justified from this record in asking this court's rejection, if not in some instances a condemnation of the solicitor general's assignments of error.

VIII.

Further observations concerning the Government Brief.

Among the specifications of error is an exception to *receiv-*
79 *ing in evidence* (Rec., p. 24) the plaintiffs' protests because "the same were invalid and insufficient and did not set forth distinctly and specifically the grounds of plaintiffs' objection as required by sec. 2931, U. S. R. S."

The objection was addressed exclusively to receiving the several protests in evidence; and not because they were unreasonable or did not adequately identify the importations or specify the exaction

complained of. The collector's claim was that their *contents* were not sufficiently distinct and specific.

It would seem that *any seasonable protest* touching the importations in question was *competent evidence* for what it might prove in the end to be worth, and that the rejection from evidence of such a paper could not be sustained because of the subsequent application to it of some artificial rule that its contents fail to accomplish their apparent purpose. A properly executed instrument under which title is claimed will not be *excluded* from evidence in aid of such title simply because of its possible imperfections in describing the premises it purports to convey. There is no such principle of law. If connected with the issue and otherwise competent, it will be received in evidence; and its effect subsequently ascertained as the testimony and the law applicable to its contents may ultimately be developed.

Protests are not deeds, or dissertations, or lawyer's briefs. They are commercial writings. They must intelligently indicate an importer's objection. They are to be read in connection with all the papers forming part of the transaction to which they relate; particularly when—as in the case at bar—they allude to them (*e. g.*, Beans, str. "Golden Horn," date of entry March 21, 1884, entry No. 37951). Reference to that entry, invoice, bill of lading, permit, affidavits, and other requisite custom-house assessment papers plainly indicates the transaction. This transaction was that the merchandise had been assessed in this instance at twenty
80 per cent., and that the importer paid the "illegal exactions" under coercion to get the goods and claimed a refund.

The importers' grounds were that the "said merchandise should be admitted free of duty, and if not free should not be charged with duty at a rate greater than ten per cent."

The collector and his superiors understood this sufficiently to acknowledge the latter alternative of the claim and to refund one-half of the twenty per cent. exacted.

But the Government now asks this court to declare that its officers were not adequately advised "distinctly and specifically" of the grounds of plaintiffs' fundamental objection!

The importer claimed his merchandise was exempt from duty. This was the distinct and specific ground of his objection. He was not obliged to add a brief of the law to sustain him, nor to outline the facts he would prove and did prove before a jury. The collector as well as importer was bound to know the law, and as to the facts, the collector had possession of the goods, and presumptively again, knew their character better than plaintiffs, who as yet had only their shipping papers to inform them.

Practically, the importers may thus be entirely misinformed as to their goods; but until seeing them they are in no such situation as the collector, with respect to actual knowledge of the character of the merchandise. These commercial custom-house papers must be treated in the light of the situations of the parties (which are unequal) and the transaction as it occurred.

With the collector and his deputies peering into the packages, the appraisers' written report of them, the shippers' statement, and the importers' claim before him, it would seem idle to argue that in truth the collector was not exactly acquainted with all
81 facts the importer could communicate, much less that the collector was misled.

So that in law and in fact the importers' protest brought distinct and sufficient specification.

Had the importers ventured to *cite* the law and cited it inaccurately, or entered upon the facts and stated them untruthfully, there would have been just cause for complaint. They did neither. They stated the proposition on which they did and would rely. They had only to give "*notice* of dissatisfaction." It was no part of their protest to prove the validity of the "notice." If they should commence that task, they might as well be called upon to write all their arguments of law, points of fact, and names of witnesses to sustain them. The collector would have importers furnish a trial brief.

In Davies *vs.* Arthur (96 U. S., p. 148), the importers stated the rate of duty which they claimed was lawful and stated it erroneously. Of course, that was not distinct and specific, and this court so held. They claimed in protesting against a sixty per cent. rate that the lawful rate on the merchandise in question was thirty-five per cent., whereas the true rate was finally adjudicated to be fifty per cent., a rate not in the mind either of the importers or of the Government at the time of assessment and protest. Afterwards, when rebates were sought on the erroneous protests, the Government declined to refund the duties, and the court held the protest to be erroneous and insufficient.

In the case at bar the plaintiffs' entire claim is expressed in the statement that the merchandise is free from duty; and to enter upon further detail is to give reasons in support of this proposition. This the law would not require in the technical declaration of a plaintiff in a suit at law, much less is it the essence of a commercial notice.

82 More-ver, this notice or protest is requisite under a statute in limitation of the common-law rights and is to be strictly construed.

It is respectfully submitted that there is no propriety in the exception regarding the protest. Besides, the Government in fact *did* understand and accept it, and act upon it by a decision (August 22, 1884; see Rec., fols. 11, 51, 65), and the collector was estopped at the trial from contesting its sufficiency.

Moreover, whether it fairly indicated the importer's claim under all the circumstances would seem to be under the most rigid rule *not* for the court to determine by rejecting the paper *from evidence*, but to be for the *jury* to pass upon in the light of the actual transaction, and upon proofs of all the facts.

The statute has given to the Secretary of the Treasury (U. S. R. S., sec. 3012½) power to refund duties which he is satisfied were illegally exacted, and the courts should not restrict the exercise of

this power to exclude refunds of excessive duties concededly illegal by the application of harsh, inequitable and unsound technicalities.

Whether a party has reasonably complied with the statute in respect to protesting is a question of fact, and the case must be of an extraordinary character to warrant its possible disposition as a question of law. In the case at bar the protest will be deemed sufficient under the evidence and the verdict.

IX.

No technicalities in protests. Notes of authorities.

In view of the contention in the Solicitor General's brief
83 urging an impropriety in the particular protest in this case (which issue really serves no useful or equitable purpose) the following notes are presented of the authorities cited by plaintiff in error, and of some pertinent authorities not so cited.

The chief circuit case apparently relied upon, *Frazee* vs. *Moffitt*, 20 *Blatchf.*, 207, cited by the Government brief, scarcely justifies the position that a protest claiming merchandise to be exempt from any duty is insufficient.

In that case the protest upon an importation of hay was against a rate beyond ten per cent., because no higher rate "can lawfully or properly be charged on hay imported." The true duty was ultimately held to be only ten per cent. as a non-enumerated and unmanufactured article, *hay* not being specifically mentioned in the schedules. The court observed that the assessment protested against had been made at twenty per cent., and that the only provision under which that was possible was section 2516, which related to manufactured and unmanufactured articles not elsewhere specified, and made them dutiable at twenty and at ten per cent. respectively. The court therefore said, that with the facts and law before him, "the collector could not fail to understand from the protest that the rate of ten per cent. claimed in it to be the proper duty was the rate of ten per cent. named in section 2516." So in the case at bar, there is but one free-list section; and when goods are claimed to be exempt from duty the statute *is* specifically referred to. Mention of the section number would not be more perfect; but in the hay case even the section number was not given. "The collector having acted under section 2516 in imposing the twenty per cent., the language of the protest fairly referred the collector to the ten per cent. clause of section 2516," says the court in the hay case.

So in the bean-seed case, the collector having acted upon the merchandise in his custody, and himself described and assessed it as seeds, "could not fail to understand from the protest" that he was to look at the free list, and there read that all kinds of seeds not elsewhere mentioned were exempt from any duty. "A pro-
84 test is a commercial document usually made in the hurry of business, entitled to a liberal interpretation, and not requir-

ing technical precision, while at the same time it must show fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the Government the practical advantage which the statute was designed to secure" (Frazee *vs.* Moffitt). In the case at bar the Government shortly before this protest (see Appendix B hereto) had notified the collector about the controversy over the seeds of beans and peas. It had just then elaborately considered *beans* as seeds, and after so declaring them, had concluded they were, the *seeds, not* free, because they were garden *seeds*, as distinguished from other kinds of seeds, and were provided for as such at twenty per cent. Nobody connected with the transaction giving rise to the case at bar could fail to derive the "practical advantage" of appreciating the importers' claim that subsequently prevailed in the verdict.

The Frazee case cites (p. 270) other cases where it was "expressly held that the statute was complied with although the protest did not designate the particular schedule and name under which the importation should be ranked."

No case, it is believed, can be cited where, upon a claim that the merchandise was exempt from duty, it was held necessary to quote from the free list. Such a rule would negative the commercial nature of a protest, and render it in most cases a weapon valueless if not ultimately fatal to the party employing it in his defense.

That a protest may make a double claim to the effect, as here, that if the goods are not free they are not dutiable beyond a stated rate instead of a still higher rate which had been assessed upon them, will scarcely be denied. In *Herman* vs. *Miller*, decided by this court in 127 *U. S.*, 363, the protest claimed that if the goods were not liable to *one* rate they were liable only to another
85 rate, which was indicated in the protest; and the adequacy of the protest was affirmed.

In *Arthur* vs. *Dodge*, 101 *U. S.*, 34, WAITE, Ch. J., said: "'Technical precision,' says Mr. Justice CLIFFORD, from the court in Davies *vs.* Arthur, is not required; but the objection must be so distinct and specific, as when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might *ascertain the precise facts* and have an opportunity to correct the mistake and cure the defect if it was one that could be obviated. We have had no difficulty in reaching the conclusion that the protest in this case fully meets the requirements of this rule. No one could have any doubt of the nature and character of the claim that was made."

So here the collector knew the goods were *seeds*. He himself asserted that fact, and he knew the plaintiff claimed *such* seeds were free.

In *Arthur* vs. *Morgan*, 112 *U. S.*, 499, this court disposed of what the Solicitor General himself termed a "bare technicality," by affirming the protest as fairly showing "that the objection afterwards made at the trial was in the mind of the party, and was brought to

the knowledge of the collector, so as to secure to the Government the practical advantage which the statute was designed to secure;" and held the exemption claimed to be good, viz., to exempt a carriage when the protest claimed exemption for "personal effects" used by the passenger for "over a year." Nobody was misled.

So a protest against the payment of twenty-five per cent. duty charged on thread laces, claiming that the laces are liable to a duty of only twenty per cent. was *held sufficient* (Steegman *vs.* Maxwell, 3 Bl., 365). So *seeds* charged twenty per cent. and claimed to be *free* come exactly within this ruling, with the additional particularity of referring the collector to the free list. So a protest against the
86 *additional valuation found on appraisement and twenty per cent. penalty charged, claiming to enter the same according to the invoice and actual cost*, is a sufficient protest without a specification as to how the appraisement was made to exceed the true value of the goods (*Lowenstein* vs. *Maxwell*, 2 *Bl.*, 401).

In *Vaccari* vs. *Maxwell*, 3 *Bl.*, 373, a protest in general terms was *held* "to be sufficiently distinct and specific to satisfy the act of 1845 *by the aid* of the invoice," &c.

P. 374: "The protest is a mercantile and not a legal instrument, and when its meaning is unmistakably plain its phraseology will not be scrupulously criticised by the courts (Swanston *vs.* Morton, 1 Curtis C. C., 294). We have always required that the collector shall have by it direct and certain *notice of the grounds* of objection to the duties assessed, but it never has been determined as indispensable that *the entire notice must be incorporated in the protest*. The invoice and entry may ordinarily be regarded as connected *with, and comprising a part of, the protest*, being the things out of which the protest arises and to which it relates."

Of course, therefore, the merchandise in the defendant's custody and under his examination and appraiser's report is to be considered as labeled with the protest and with these custom-house papers.

In this trim, and with the Secretary's dissertation (of March, 1884, on seeds or beans) fresh from the official press, it seems desperate to urge actual ignorance of the meaning of this importers' notice. This is not an instance where custom-house ignorance will be judicially inferred.

In the Vaccari case, the court proceeded to examine and consider the invoice, entry, oaths and protest, as connected with each other; and was "*bound to assume*" that the *invoice, entry and protest was before the collector* when he fixed the duties; particularly where the legality of the practice then questioned had been a subject of
87 consideration at the custom-house and in court. The court said: "We think that the present protest, in conjunction with the other papers accompanying it, furnish to the collector a sufficiently precise statement of the ground of objection," &c., &c.

In Chung Yune *vs.* Kelly, 14 Fed. R., 639, protest was against duties paid on sago flour, taxed as starch, the protest being that sago flour was free. Held, that plaintiff must recover, if at all, on the ground stated in the protest; therefore, if article not flour, he could not recover, even if the article was not dutiable.

So if we had claimed these articles to be sago flour and free as such, the proof that they were free as seeds would not have helped us. Better way is to tell the collector, as in effect we did, that the beans he assessed as *garden* seeds, are *not* such, but were seeds which were free;—nobody questioned that they were seeds, as by inspection they were.

In *Maillard* vs. *Lawrence*, 3 *Bl.*, 381, it was said: "In view of the fact that the *Treasury circular was in the hands of the defendant*, and was used by the officers as the rule governing their valuation of the goods, we think that the protest is to be regarded as an objection to that rule, and as an adequate compliance with the act of February 26th, 1845, and that it set forth with all necessary distinctness the grounds of objection to the amount of duties assessed."

In fairness and in fact the "notice of dissatisfaction" lodged in the case at bar, did acquaint everybody concerned with the importers' claims; and the Government so responded in deciding upon it. The protest evincing such claim which was in fact lodged was not only adequate but was competent to be received in evidence.

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X.

Conclusion.

In conclusion, it is therefore submitted, that it being beyond controversy that the importations in question are seeds of the field bean, and neither garden seeds nor the vegetable itself in any form, but simply its seed, the classification of the article for duty is established. A classification so fixed is not to be disturbed because the article is or is not edible or is commercially called beans or not called in trade a seed or is not used for planting.

Seeds is a common plural noun incapable of trade explanation to inform the judicial mind. Besides, it is testified to be "a general or popular term," and has no special trade signification. Common knowledge as to the distinction between vegetables and their seeds is, therefore, the narration of common facts of elementary knowledge in harmony with the judicial cognizance and trade usage. If there were not an harmonious unity of meaning in the use of the terms *vegetables* and *seeds*, both in trade, in science and in common speech, the case might be different. The attempt to fasten a factitious meaning to descriptive terms of common speech has been uniformly condemned. This court will not permit tariff terms to be evaded by any such artifice. In this case the rule will not be varied because the Government seeks its relaxation. It is true in tariffs—as in contracts and deeds—that if words are novel, obscure or of an obvious commercial peculiarity requiring explanation before they can be comprehended by the public mind, testimony may be received to aid in the application of such words to objects of revenue. But such instances are rare, and must arise upon the face of the statute. Exceptional significations cannot be lawfully
89 admitted to vary or to destroy the obvious descriptions of a revenue statute. Congress uses terms in their natural sense;

and when the terms are those of common speech this sense cannot be varied by any testimony. Else the law would be uncertain, unequal and of unjust discrimination in its operation.

Hence, commodities confessedly seeds of the bean, assessed by the Government as seeds of the garden bean, and shown by uncontradicted testimony to be seeds of the field bean, cannot, under the verdict and testimony of this case escape the classification of seeds by assigning some artificial meaning not found in the statute to the term "seeds."

The judgment should be affirmed.

JOSEPH H. CHOATE,
HENRY EDWIN TREMAIN,
MASON W. TYLER,
For the Defendants in Error.

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APPENDIX A.

(6046.) GARDEN SEEDS—PEASE, &c.

TREASURY DEPARTMENT, *November* 27, 1883.

SIR—The Department is in receipt of your letter of the 20th instant, submitting the appeal (12281) of Messrs. Chase Brothers from your assessment of duty at the rate of 20 per cent. *ad valorem* on certain pease imported, per steamer "Norseman," from Canada.

You classified the merchandise at the rate of duty before specified under Schedule N, paragraph 465, of the tariff act of March 3, 1883, for garden seeds.

It seems to be conceded that the pease referred to were imported as seeds, and not for consumption as vegetables, and the question presented is whether they are garden seeds. The general and not the exceptional use must determine the classification of the article. *As a rule pease, beans and many other vegetable products are more largely sown in the field or farm than in the garden*, although some varieties may be specially adapted for garden planting.

It is held by the department that all pease and beans imported for seed are entitled to free admission under the provision in the free list, paragraph 760, *for seeds of all kinds not specially enumerated or provided for in that act.*

You can readjust the entry accordingly, and cause your practice to conform to this ruling.

I may add, for your further information, that the department regards seeds, such as barley, *beans*, beets, carrots, cabbage, clover, corn, cane, grass, mangel-wurzel, oats, onions, potatoes, pumpkins, rye, tobacco, turnip, wheat, and other like products as belonging to the category of agricultural *seeds which are not garden seeds*, and that seeds of the artichoke, asparagus, borecole, Brussels sprouts, cauliflower, celery, cucumber, egg-plant, lettuce, leek, okra, parsley, pepper, rhubarb, radish, salsify and tomato belong to the category of garden seeds.

It is impossible to enumerate all the seeds which belong to either of these divisions in detail, and the above is given for information as to the principle upon which collectors of customs must act. Other cases will be disposed of as they arise.

Very respectfully,

H. F. FRENCH,
Acting Secretary.

Collector of customs, Rochester, N. Y.

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APPENDIX B.

(6273.) DUTIES ON BEANS AND PEASE.

TREASURY DEPARTMENT, *March* 28, 1884.

SIR—The department duly received your letter of the 3d instant, submitting the appeals (4565i and 4566i) of Messrs. D. Landreth & Son from your assessment of duty at the rate of 20 per cent. *ad valorem* on certain beans imported per "Illinois," February 13, and "Vaderland," February 25, 1884.

Duties were assessed under paragraph 465 of the tariff of March 3, 1883, which imposes a duty of 20 per cent. *ad valorem* on "garden seeds, except seed of the sugar-beet."

The appellants claim that the merchandise is free of duty, under paragraph 760 of the free list, for seeds of all kinds, except medicinal seeds not specially enumerated or provided for in that act.

Reference is made in the papers to decision No. 6046 of November 27, 1883, in which it was stated that the department regards seeds, such as pease and beans, and some others therein mentioned, as belonging to the category of agricultural seeds, which are not garden seeds.

The Secretary has deemed it proper to review the whole question in the light of the information now before the department, and the following is his opinion upon the classification of seed beans, which are the subject of the present appeals:

The appellants brought in, by the steamship "Vaderland," a quantity of "*beans.*" They made a like importation by the steamship "Illinois." There is no more specific description in the papers of the imported article than that given above, viz., "*beans.*"

I infer that they are some variety of the seed of the bean plant or vegetable grown in gardens and fields, and intended for food, or for planting or sowing.

Beans are spoken of by that name in but three places in the tariff act: T. I., new, pars. 94, 636, and 808. Not one of those paragraphs touches the article now in consideration. Paragraphs 94 and 636 speak of beans not edible, while this article is edible. Paragraph 808 speaks specifically of Tonquin, Tonqua or Tonka beans, and they are not this article.

These goods not being spoken of by name in the tariff act, they are not specifically enumerated or specifically provided for thereby.

92 Are they affected by the tariff law by other language therein than that of specific mention? Consider that, when framing the tariff act of 1883, Congress did, to some extent, provide in terms for beans by that name. In doing so, it made a distinction between those edible and those not edible, and admitted the latter free of duty. It is plain, then, that it had in mind beans edible, and beans not edible, and appreciated, and meant to state a distinction. When, then, it made an express provision for one kind by mention of it, does not the maxim apply *expressio unius, exclusio alterius?* Having, by express provision, suffered to come in free of duty the beans not edible, is not the inference strong that it did not mean to admit free of duty the beans edible, and that it meant to provide for them in some other part of the act.

That law speaks of *vegtables.* But beans of the kind, or in the form of the article in consideration, as an article of commerce, are not *vegetables.* They are the seeds of the bean plant, which latter is a vegetable. So paragraphs 286, 287 and 636, where mention is made of vegetables, do not apply.

As these beans are seeds, what does the tariff law say of seeds? Seeds are spoken of by that name in T. I., new, in five places: Paragraphs 94, 636, 760, 761, 465. Paragraphs 94 and 636 do not apply to this article of seeds, for these are edible. Paragraphs 760 and 761 use words broad enough to take this article in, unless it is more particularly provided for in another part of the tariff act. If there is any other part that does so, it is paragraph 465, which says: "Garden seeds, except seed of the sugar-beet, twenty per centum ad valorem."

In common speech, garden seeds are seeds used either for planting or sowing in the gardens adjacent to dwelling houses, small spaces of land, and in the larger spaces of land called market gardens, lying about cities or other large places of numerous and condensed population. The common notion of garden seeds is this, that they are those seeds from which are raised, in the growing season of the year, the vegetable products which, before complete maturity, are used upon the table as part of the customary food of mankind, and in distinction from those seeds which, sowed or planted on a broader scale in the fields, produce the vegetables which are stored for winter use as food. Yet it is to be taken note of, that by extended field culture there is produced much of the seed which finds its way to market and to sale as garden seeds in the common notion thereof above siated. It is not easy, therefore, to say of any importation, on general principles, that it is of garden seeds or of field seeds; nor to frame a rule, on general principles, and general knowledge, which will always exactly apply. We are constrained, therefore, to see if we can by interpretation get at the purpose of Congress, and if it did not intend to charge the phrase "garden seeds," in paragraph 465, with an

93 arbitrary meaning. It has made an exception of the seed of one vegetable from the general expression "garden seed." It must have been thought by Congress that there was need of that exception, or that else the seed excepted would properly and necessarily be treated by the administrative officers of the Government as garden seeds. It follows, then, that Congress thought that seeds like the seed of the sugar-beet were garden seeds. We have then an idea of what kind of seeds Congress meant when it spoke the phrase "garden seeds." Now, the sugar-beet is not a plant or a vegetable exclusively, nor mostly of the growth of gardens. It is, on the contrary, mostly the growth of the field or of the market garden. If the sugar-beet is in the view of Congress a garden plant, or vegetable, as well as, or in cont-act with, a field plant, and its seed, garden seed as well as, or in contrast with, field seed, surely the bean is in legislative contemplation a garden seed or vegetable, *and the bean of the market, which is the seed of the bean plant, is a garden seed as well as, or rather than, a field seed.* We know that, in fact, the bean, as a seed of the bean plant, or vegetable, is planted in the garden, and is largely planted in the field also.

In the former case, generally, to be eaten green in the pod, as a green esculent, though sometimes, as with Lima beans, in the form of the seed of the plant. In the latter case, for the production of seed for subsequent planting and for food in the form of the matured seed. It is to be noticed, too, that elsewhere in the act, when garden seeds are mentioned, they are so in contrast or opposition to seeds which are not of the character of beans or other seeds used for sowing or planting both in field and garden. As in paragraph 94, where the phrase is "seeds, aromatic, not garden seeds," and "seeds of morbid growth;" and so in paragraph 636 the seeds put in the free list are "seeds, aromatic, and seeds of morbid growth."

As the beans are garden seeds in some of the uses of them, and as it is to be got by interpretation that Congress meant to include such seeds as that of the bean in the phrase "garden seeds," in paragraph 465, the conclusion must be that the article under consideration is properly classified under paragraph 465 (T. I., new).

This ruling applies equally to pease, and the duty of 20 per cent. ad valorem will, therefore, be exacted on both, on entries of such merchandise.

Your decision assessing duty as aforesaid on the goods covered by said appeals is hereby affirmed.

Very respectfully,

H. A. FRENCH,
Assistant Secretary.

Collector of customs, Philadelphia, Pa.

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APPENDIX C.

The seeds of the lentil plant are declared free of duty.

(6608.) FREE ENTRY—LENTILS.

TREASURY DEPARTMENT, *October* 21, 1884.

SIR—The department is in receipt of your letter of the 20th instant, in regard to the proper classification of lentils imported by Henry Eggers.

The question arose upon a difference of opinion between the naval office and your office. The naval officer held that the articles were not seeds, but were dutiable as vegetables, under paragraph 286, at 10 per cent. ad valorem. This view was based partly upon the fact that prior to the act of March 3, 1883, such merchandise was classed as vegetables, and not as seeds, and also from the fact that these articles being edible they are excluded from the free list, because paragraph 636 excepts therefrom vegetables and seeds which are edible, and, that paragraph 760, for seeds of all kinds, except medicinal seeds not otherwise provided for, refers only to such articles as are intended to be replanted in this country.

Lentils as commonly imported are seeds of a vegetable. In the American Cyclopedia (volume 10, page 79) lentils are described as an esculent seed of the pea family, and it is stated that the plant bears pods containing from one to four round, flattened, doubly convex seeds; that the cultivation of the lentils is very similar to that of the pea, requiring a dry, warm, sandy soil, and that it is sown early in May, broadcast, if intended merely for fodder, but in drills when the ripe seeds are desired.

The appraiser reports that the articles forming this importation are the seeds of the lentil plants, and that they are not garden seeds, and not being generally sown in gardens, but are field seeds, and so fall into the classification in the provision in paragraph 760 for seeds of all kinds not otherwise provided for, which are free of duty. That they are seeds and not vegetables is shown by decision 6273, regarding duty on beans and pease, which states that beans of the kind or in the form of the article then under consideration, as an article of commerce, are not vegetables, but they are the seeds of the bean plant, which latter is a vegetable. *Whether seeds of the character in question are intended for use as an article of food or for planting purposes does not control the question of their classification.* They are still to be
95 classed as seeds regardless of the purposes for which intended.

Paragraph 636 excepts these from edible seeds of the kind therein provided for, but so far as concerns seeds it only includes aromatic seeds and seeds of morbid

growth, and lentil seeds are neither of these varieties, and so are not affected by that paragraph.

The department decides that lentil seeds are free of duty under paragraph 760.

You will take action accordingly.

Very respectfully,

H. F. FRENCH,
Assistant Secretary.

Collector of customs, New York.

APPENDIX D.

Webster's Dictionary defines "bean" as a "well-known leguminous plant and its seed of many varieties, the principal species being the *Faba vulgaris.*"

The third volume of Encyclopedia Britfan-ica (1876), page 398, thus defines "bean":

"The *seed* of certain leguminous plants cultivated for food all over the world and furnished chiefly by the genera Faba, Phaceolus, Dolichos, Cajanus and Laja. The common bean in all its varities as cultivated in Britain and on the continents of Europe and America is the product of the Faba Vulgaris. The French bean kidney or haricot is the *seed* of the Phascolus Vulgaris, but in India several other species of this genus of plants are raised and form no small portion of the diet of the inhabitants. From the genus Dolichos again the natives of India and South America procure beans or pulse of no small importance as articles of diet, such as the D. Ensiformis or sword-bean of India, the Lima bean, &c. *Besides these there are numerous other pulses cultivated for the food* both of man and domestic animals, to which the name beans is frequently given. The common bean is even more nutritious than wheat, and contains a very high proportion of nitrogenous
96 matter under the form of legumen, which amounts on an average to 74 per cent. It is, however, a *rather course food* and difficult of digestion, and is chiefly used to feed horses, for which it is admirably adapted. In England French beans are chiefly, almost exclusively, used in the green state, the whole food being eaten as a table vegetable or prepared as a pickle. It is wholesome and nutritious, and in Holland and Germany the pods are preserved in salt by almost every family for winter and spring use. The green pods are cut across obliquely, most generally by a machine invented for the purpose, and salted in barrels. When wanted for use they are steeped in fresh water to remove the salt and broiled or stewed."

The second volume of Appleton's Cyclopedia (1873), page 416, thus defines "bean":

"Beans, the *seed* of leguminous plants of three genera, Faba, Phaseolus, and Dolichos, of which the Faba Vulgaris furnishes the different varieties of the common bean, cultivated for food throughout the world. It originated in the East and is said to be still found wild in Persia, and has been known and cultivated in all ages. The French kidney bean (haricot) is the *seed* of the Phaseolus Vulgaris, and in India and South America species of Dolichos are raised such as the sword-bean of India (D. Ensiformis and the Lima bean, the latter extensively cultivated in the United States), and furnish an important item of food, &c.

The garden and field beans brought to market here have a variety of names, among which the Lima, Windsor, dwarf and kidney are favorites."

These all are seeds.

"The Home and Farm Manual," page 963, 1884:

The varieties of beans are innumerable, the sorts in greatest request for their green pods being colored, while those used for their dried *seeds* as food being the white varieties. The pea (Navy) bean, the marrow bean and the Lima bean are carried to all parts of the civilized world and are considered indispensable to armies, navies and mariners generally. They are both exceedingly rich in flesh-*looking* material, such as starch, gum, gluten, and deficient in oil.

EXTRACT OF THE REPORT OF THE DEPARTMENT OF AGRICULTURE FOR 1865, P. — TO P. 419.—The next *seeds* in the economy of the farm are the leguminous, which

are less valuable for fattening purposes than any of the preceding, although they contain a larger proportion of nutritious matter than any of the cereals. The following table gives the composition of the different varieties as given by Braconnet and Einhof in Prof. Johnson's lectures on Agricultural Chemistry:

97 Constituents.	Pease.	Kidney beans.	Field beans.	Lentils, dried.
Water	12.5	23.0	15.6	
Husk	8.3	7.0	10.0	18.7
Legumen, albumen, &c.	26.4	23.6	11.7	38.5
Starch	43.6	43.0	50.1	32.8
Sugar	2.0	0.2	2.2	3.1
Gum, &c.	4.0	1.5	6.0	6.0
Oil and fat	1.2	0.7		
Salts and loss	2.0	1.0	4.4	0.9
	or econo	mically:		
Water	12.5	23.0	15.6	
Flesh-formers	26.4	23.6	11.7	38.5
Fat-formers	46.8	43.9	52.3	35.9
Accessories	12.3	8.5	16.0	24.7
Animal matter	2.0	1.0	4.4	0.9

These analyses differ materially from those of the same *seeds* grown in this country; whether the difference is owing to the influences of soil or climate, I am, of course, unable to say. Probably both have their effect. The *seeds* in the following analyses were very dry and well-ripened:

Constituents.	Pease.	Kidney beans.	Field beans.	Lentils, dried.
Water	14.2	15.0	14.9	14.0
Casein	23.1	23.9	24.0	25.7
Starch	38.0	35.1	35.7	34.8
Sugar	2.0	2.1	2.0	2.1
Gum	8.7	8.5	8.7	6.9
Fat	1.3	2.1	2.0	2.0
Woody fibre	9.8	9.8	9.5	12.5
Mineral matter	2.0	3.5	3.2	2.0
	or econo	mically:		
Water	14.2	15.0	14.9	14.0
Flesh-formers	23.1	23.9	24.0	25.7
Fat-formers	41.9	39.3	39.7	38.9
Accessories	18.5	18.3	18.2	18.6
Mineral matter	2.3	3.5	3.2	2.8

The casein in the last analysis corresponds in nature to the legumen in the others.

Patent Office Reports: The topic of field beans will be found discussed officially in Patent Office Reports for 1854, page 336, where the recognized varieties are stated (*ibid.*, 1859, pp. 317, 318), and in Encyclopedia Britannica, ninth edition,
98 page 335. See also "Farming for Profit," published 1880 by J. C. McCurdy & Co., page 267; Report of Department of Agriculture for 1876, article on white beans as a field crop. In the report of Department of Agriculture for 1862 white beans are regarded as a grain.

"Seeds" in the Tariff.

The following are illustrations of various places in the existing tariff where seeds are alluded to: Schedule N mentions hemp seed, rape seed and other oil seeds of

like character; nuts, farina, arrowroot, coffee, anise, chamomile. In referring to seed oils other various seeds are thus indirectly mentioned, viz., fennel, juniper, mace, poppy, rosemary, thyme. Other mention is of flaxseed, mustard seed, acorns, rice, corn, barley, wheat, etc., etc., etc.

The foregoing instances of enumeration indicate that seed for a variety of purposes and in a variety of ways and at a variety of rates are alluded to, specially enumerated or classified in the tariff; and that articles which are the direct product of seeds, such as corn-meal, oatmeal, rye flour, wheat flour, rice flour, etc., are distinguished by name from the seeds of which they are the product; and that many articles which are the direct products of seeds, and which represent the entire plant comprising such product, are specifically mentioned in the tariff, such as hay, hops, etc.

Thus, official literature, tariff classification and the recognized authorities of general knowledge concur in the distinctions made in the case at bar between field seeds and garden seeds, and between all seeds and the plants or part of the plant capable of being produced from seeds, and that seeds have many names and many uses.

Supreme Court of the United States, October Term, 1888.

WILLIAM H. ROBERTSON, Collector of the Port of New York, Plaintiff in Error,
vs.
LOUIS A. SALOMON and CHARLES SALOMON.
No. 446.

In error to the circuit court of the United States for the southern district of New York.

Argued January 16, 1889; decided April 15, 1889.

Mr. Justice BRADLEY delivered the opinion of the court:

This is an action brought by the defendants in error against the collector of New York to recover an alleged excess of duties on goods imported. The goods referred to were white beans, upon which the collector levied a duty of twenty per cent. *ad valorem* as garden seeds. This charge was paid under protest, the plaintiffs insisting that the article was exempt from duty under the free list, as seeds "not otherwise provided for," or, if not free, they were only dutiable at ten per cent. as "*vegetables*." The Treasury Department finally conceded that the beans did not properly come under the denomination of "garden seeds" and directed ten per cent. to be refunded, but still insisted that they are liable to a duty of ten per cent. as "vegetables," in the general category of "articles of food." The plaintiffs adhere to their first position, that beans are free of duty as seeds "not otherwise provided for," and that is the only question here presented.

The clauses of the law which are to be construed in determining the controversy are to be found in the last customs-duties act, passed March 3, 1883, as a substitute for title XXXIII of the Revised Statutes. Among the various schedules attached to this act classifying the articles subject to or free from import duties is one entitled "Provisions," in which are enumerated, amongst other things, beef and pork, cheese, butter, lard, wheat, rye, barley, Indian corn, oats, meal, flour, potato or corn starch, rice, hay, different kinds of fish, pickles, potatoes, *vegetables* in their natural state or in salt or brine, not specifically enumerated or provided for in this act, vegetables prepared or preserved, currants, dates, fruits of various kinds, almonds, walnuts, peanuts, &c. Beans are not mentioned specifically in this list. If they are properly classed under the term "vegetables in their natural state," they are subject to a duty of ten per cent., as contended for by the Government.

Under the head of "Free-list sundries" we find amongst a great number of other miscellaneous articles the following: "Plants, trees, shrubs, and vines of all kinds not otherwise provided for, and *seeds of all kinds*, except medicinal seeds, not specially enumerated or provided for in this act." If the white beans imported by the plain-

tiffs are properly to be classified as "seeds," then they are free from all duty, as claimed by the plaintiffs.

Schedule N, entitled "Sundries," contains a list of miscellaneous articles (many of them articles of manufacture) subject to various rates of duty. The following is one of the items of this schedule: "Garden seeds, except seed of the sugar-beat, 20 per cent. *ad valorem*." If white beans are to be classed as "garden seeds," then the original decision of the collector was right. This decision, however, has been abandoned, and we think very properly. Although beans are often planted in gardens as seed, yet, as a product and a commodity in the market, they are not generally denominated as "garden seeds" any more than potatoes, which are also sometimes planted as seeds in gardens. The same consideration also applies in regard to the use of the more general term "seeds." We do not see why they should be classified as seeds any more than walnuts should be so classified. Both are seeds in the language of botany or natural history, but not in commerce nor in common parlance.

On the other hand, in speaking generally of provisions, beans may well be included under the term "vegetables." As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary or can be produced. But on the trial the parties deemed it important to introduce a great deal of testimony. The court, however, did not allow the defendant to prove the common designation of beans as an article of food. It was shown by the evidence that beans are generally sold and dealt in under the simple designation of "beans;" but that does not solve the question as between the rival designations of "seeds" and "vegetables." The common designation, as used in every-day life, when beans are used as food (which is the great purpose of their production), would have been very proper to be shown in the absence of further light from commercial usage. We think that the evidence on this point ought to have been admitted. In addition to this, the court told the jury that "the commercial designation of the article or what the article is called in trade and commerce or the name bean has nothing to do with the question." We think the court erred in this instruction. The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. (See *Arthur* v. *Lahey*, 96 U. S., 112, 118; *Barber* v. *Schell*, 107 U. S., 617, 623; *Worthington* v. *Abbott*, 124 U. S., 434, 436; *Arthur's Executors* v. *Butterfield*, 125 U. S., 70, 75.) But if the commercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation. We think, therefore, that the court erred, both in its charge and in the exclusion of the evidence offered, especially as without any evidence and with the common knowledge

which we all possess the court might almost have been justified in directing a verdict for the defendant.

We have not adverted to a clause of the customs act in which beans are specifically named, because we do not think it applies to the case. We refer to that clause of the free list which enumerates "drugs, barks, *beans*, berries, &c., any of the foregoing of which are not edible and are in a crude state." As this clause refers to articles "not edible," it cannot include beans of the character now under consideration.

Nor have we thought it necessary to refer particularly to the case of *Ferry* v. *Livingston* (115 U. S., 542), in which the clauses of the law respecting "garden seeds," in Schedule N, and "seeds of all kinds," in the free list are elaborately discussed and commented on. There the question was between "garden seeds" and "field seeds," and the decision depended on the particular circumstances of the case. The opinion concludes with this declaration: "As this case rests for decision on the facts found, it is not possible for this court to lay down any general rules which will apply to cases differing in their facts from this case." We regard our present decision as in harmony with the decision in that case and only refer to it for the purpose of disclaiming any intention to dissent from it.

The judgment of the circuit court is reversed, and the cause remanded with instructions to order a new trial.

Office Supreme Court U. S.
FILED.
OCT 8 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895—TERM No. 16.

HYMAN SONN AND HERMANN SONN, PARTNERS AS SONN BROTHERS,
Plaintiffs in Error,

against

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

HENRY EDWIN TREMAIN,
MASON W. TYLER,
146 Broadway, New York City,
In behalf of Plaintiffs in Error.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

HYMAN SONN and HERMANN SONN, Partners as Sonn Brothers, Plaintiffs in Error, AGAINST DANIEL MAGONE, Collector of the Port of New York.	October Term, 1895. No. 16.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This writ of error is brought to review a judgment entered upon a verdict rendered for defendant by direction of the trial Court in the United States Circuit Court at New York on January 15th, 1891. The plaintiffs had sued for alleged excessive import duties, exacted by the New York Collector of Customs and paid him by the importers, in order to get their goods, and under protest (Rec., fols. 19 and 46); and plaintiffs afterwards sued pursuant to the statutes (Rec., p. 9). The suit arose under and is governed by the statutes in force prior to the Acts of 1890, when the tariff was changed and the right to maintain such actions was terminated. Plaintiffs claimed the imported articles were exempt from duty.

The exhibits or samples about which both the evidence and the exceptions revolve are here necessary to be recapitulated.

The Samples.

In considering the evidence and the exceptions, it is essential to observe other than by their record numbers what the samples are, namely, Samples Nos. 3, 4, 5, 6, 7 and 8, which are continuously mentioned in the record. There was much difficuly in getting their ocular descriptions reduced into language, but these samples were ultimately received in evidence, and by record descriptions from the lips of witnesses, may be denoted as follows:

Sample No. 3 represents "the seeds of the lentil" (Rec., fol. 20).

Sample No. 4 represents "the seeds of the field bean" (*Ib.*); both (3 and 4), being the "matured" seed, capable of reproducing its kind (see Rec., pp. 9–10, fols. 47–48); and 3 and 4 do not belong to the class in commercial parlance styled "vegetables" (fols. 26–44). No. 4 "is the dry seed of the bean plant; it is not the entire vegetable (fol. 61).

Samples Nos. 5–6–7 represents species of vegetables in their "canned or prepared" condition (fol. 22, p. 11); all being *vegetables* by commercial usage (fols. 34–35, p. 20), and sold entirely as "vegetables" (fol. 43).

Sample No. 8 represents the bean in the natural state (fol. 24) or, the natural bean (p. 13). It is a commodity of trade, and is commercially known as a vegetable (fols. 26–47, pp. 14, 28), and is the green pod of the bean plant enclosing the green immature seeds. "It does not, in its present immature form, contain the principle of reproduction" (Rec., fols. 47–48).

The Government defended the assessment, which was at ten per centum *ad valorem*.

There were several importations involved, which were made in 1887 and 1888, and they comprised two classes of articles represented respectively by the two samples referred to in the record as samples numbered *3* and *4* at the trial.

The Tariff Clauses.

The phrase of the free list (Tariff of 1883) under which the merchandise is claimed to be exempt from duty reads: * * * "*Seeds of all kinds, except medicinal seeds, not specially enumerated or provided for in this act.*" (22 U. S. Stat., 520, Tariff Index, Par. 760.)

The articles in controversy were not claimed by the Government to have been thus "specially enumerated or provided for in this act," except as they were excluded from the foregoing phrase and included within the phrases under which they were assessed, viz.: "Under the first of the following clauses* of Schedule G:" "*Vegetables in their natural state*, or in salt or brine, not specially enumerated or provided for in this act ten per centum ad valorem; vegetables prepared or preserved, of all kinds, not otherwise provided for, thirty per centum ad valorem." (22 U. S. Stat., 504, Tariff Index, Par. 286.)

The Claim.

The claim made below and here by the plaintiffs in error is that the classification of merchandise for customs purposes is not to be *judicially* ascertained except upon competent evidence, tending to describe the imported merchandise. The ocular observation, by a judge, of an exhibit in evidence may sometimes supplement but may not become a substitute for that description through language which tends in speech so to identify one commodity from another that the limitation of various *statutory* descriptions may respectively be applied to the classes of imported commodities to which they are intended to relate; and the tariff classification of such commodities is necessarily dependent on competent testimony descriptive

*Quoted from Government Brief in accompanying Salomon reprint, page 38.

of the articles or of the classes of described commodities that do, in fact, exist.

Irrespective of *any* testimony whatever, the tariff classification of an imported article cannot properly be *judicially* declared. Such classification is not *per se* a matter of law. Requiring *some* testimony, the dutiable classification may then become a question of *fact*, or a question of *law*, or a mixed question *of law and of fact*, dependent upon the evidence properly received or excluded in each case.

In the case at bar plaintiffs insist that the tariff classification of the commodities involved presents questions *of fact* capable of being solved only by *evidence*, and that *all competent evidence* to that end should be received, and should be submitted with proper instructions to the jury.

The Questions

therefore presented here are (1) whether the trial Judge was right in refusing to submit the case to the jury at all, or upon all or any of the instructions to the jury prayed for by plaintiffs; and (2) whether the trial Judge rightfully excluded, as he did, the bulk of plaintiffs' proffered testimony, while receiving some of the defendant's testimony descriptive of the tariff classes and of trade classes of commodities necessarily under investigation; and (3) whether, under the circumstances, it was not an error to direct a verdict for the defendant, because "the predominant use of the searticles" is for food (Rec., fol. 89), instead of submitting the case to the jury. The tariff clauses in question are silent as to *use*.

The Plaintiffs' Case.

The plaintiffs sought to establish that by common speech and in trade parlance, and in tariff phraseology, there was a marked distinction to be observed between the *seeds* of vegetables and the *vegetables* themselves; and that this distinction was capable of description by competent witnesses; and that the commercial usages were not inharmonious with the common English vocabulary; and

that trade usages recognized these respective *classes* of commodities; and that in accordance with such vocabular acceptation and trade usages, the articles represented by samples Nos. 3 and 4 did *not* belong to the class of *vegetables;* and that the tariff phraseology in respect to *vegetables* "prepared" or in their "natural state," related to a well-recognized *class* of commodities distinguished from and not including the dried and matured *seeds* of such vegetables.

The plaintiffs further insisted that the defendant's opposing claim that the term "seeds" was limited in common speech or in trade parlance, or in tariff phraseology to commodities that were bought and sold for planting purposes was not true, in fact; was not and could not be supported by evidence; and that upon any such claim by the defense, if there was any competent testimony tending to support it, sufficient countervailing proofs on this branch of the case had been brought out to entitle plaintiffs to go to the jury.

The plaintiffs in error further claim that they on plaintiffs' behalf endeavored to conduct the trial below on the lines laid down by this Court in its decision in Robertson *v.* Salomon, 130 U. S., 412, and that the excluded questions plaintiffs propounded to the witnesses, and the instructions plaintiffs requested for the jury were upon the lines of the decision in that case; and that the trial Judge below (1) *misapprehended what was actually decided by this* (*Supreme*) *Court in that case, and* (2) *failed to rule in harmony with that decision.*

Moreover, it was and is contended that the decision of this Court in that (Salomon) case did *not* approve of a *direction* for a verdict as asked for and refused at that trial, because this Court explicitly stated, in respect to an exception on that point, that the trial Court "*might* ALMOST *have been justified in directing a verdict for the defendant*" without "any evidence, and with the common knowledge which we all possess." "*Almost*" a hit, is only a miss; and the reversal of plaintiffs' judgment in that case was by this Court's opinion exclusively rested upon the trial Court's errors "in its charge (as to trade usage), and in the exclusion of the evidence offered" (as

to common designation). (See Salomon reprint, pp. 72–73).

Assignments of Errors.

1. It was error for the Court to exclude answer to the following question asked by plaintiffs' counsel of a witness (plaintiff) who dealt in these canned or "prepared" vegetables:

"Q. Are they (indicating samples 5, 6, 7) a species of vegetable? Defendants' Counsel: We object to that. The Court: Is not that a question for the jury, whether they are vegetables or seeds? That is what the jury are to say.* Defendants' Counsel: I object to it both as incompetent and immaterial—whether these green things are vegetables—these things are not in suit. The Court: I will sustain the objection to that question"; and plaintiffs excepted (Rec., p. 12, fol. 23).

2. It was error for the Court to exclude testimony upon commercial usage under the following questions: "Q. Do you know what the articles are which are commercially known as vegetables, either (using the tariff language) 'in the prepared state' or 'in the natural state'? Ans. I do. Q. Could you say that there are many varieties or only one variety of that class?" Objected to as immaterial, and testimony excluded. To which exclusion plaintiff excepted (Rec., p. 12, fol. 24).

3. It was error for the Court to exclude evidence under the following questions to a witness who immediately had testified to observing "a large number of varieties of vegetables which are staples in trade and commerce and of importation, both in their natural state and in their prepared state," viz.:

"Q. I show you some commodities which, for convenience, I will have marked '8 for identification,' and I ask you whether that sample does or does not represent a commodity of vegetable in its natural state? * * * Ans. Yes; this is the natural bean. Q. And it is an

* But that is precisely what the Court subsequently refused to submit to the jury (Rec., p. 58).

article of trade and commerce? Ans. Yes. Q. Is it or is it not known as a vegetable * * * in trade and commerce?" Objected to. Here followed a discussion ending under plaintiffs' exception, and with the Court suggesting objection to form, and with plaintiffs' counsel recurring to the original inquiry, and asking: "Q. I wish to know whether the article marked sample 8 in trade and commerce is one of the articles which are dealt in under the commercial class of 'vegetables'? Defendants' Counsel: Objected to as immaterial," and the objection, under due exception, was sustained (Rec., p. 13).

4. It was error for the Court to exclude the testimony under the following questions put to John Wakeman, plaintiffs' witness of thirty years' commercial experience extending to articles represented by all the samples before him, viz., Nos. 3, 4, 5, 6, 7 and 8.

He was "familiar with the staple commodities that in commercial usage are classed under the term 'vegetables," and likewise "with the staple commodities which, in commerce, are classed under the heads of 'seeds;'" and having so testified, he was shown all the samples Nos. 3, 4, 5, 6, 7 and 8, and was asked: "Q. Will you state which, if any, of those articles represented by *all* the samples before you in commercial usage, are classed under the head of 'seeds,' and which, if any, are classed under the head of vegetables? Ans. As I know the commercial usage, these are all vegetables (referring to Exhibits 5, 6, 7 and 8). Q. How about samples 3 and 4, are they vegetables? Objected to as immaterial and incompetent. Question excluded * * * Exception by plaintiffs' counsel" (Rec., p. 20). "Q. Have you answered my question, with respect to samples 3 and 4? What are samples 3 and 4? Defendant's counsel: I object to that. The Court: I sustain the objection." And plaintiffs' counsel duly excepted. "Q. Will you please look at *all* of the samples which we have shown you and state what they are?" Objected to as before and objection sustained, and exception taken (*Id.*, p. 21).

5. It was error for the Court, and particularly at its own instance, to suspend a descriptive response of the

same witness and to strike out his answer, and to characterize, interrupt and exclude the replies to the following questions, viz.: "Q. I show you sample No. 3 and ask you to state the distinguishing characteristics, if any, of that commodity? Ans. It is lentil. The Court: That is not an answer to the question. The question asks you to state the distinguishing characteristics of it. Plaintiffs' counsel: I will ask that question about sample No. 8, and ask whether he can state by an inspection some of the distinguishing characteristics, if any, of that particular commodity. Ans. This is a bean in the pod. The Court (interrupting): That does not answer the question. Plaintiffs' counsel: Give a complete description in answer to that question. The Court: The first part of that answer must be stricken out as not responsive. To state that it is a bean does not give its distinguishing characteristics. Plaintiffs' counsel: I respectfully take exception to your Honor drawing any conclusion from the witness' testimony. I take the benefit of an exception, and insist that the answer ought to stand," &c. (Rec., p. 21).

And again a question by plaintiff's counsel: "Q. Give the best answer you can—a straightforward answer to a straightforward question. State the characteristics, if any, of that particular commodity. Ans. This (referring to sample 8) is a vegetable that is used for food. Defendant's counsel: I object, and move to strike that out as irresponsive. The Court: It is not responsive. Objection sustained"; and plaintiff's counsel duly excepted (Rec., p. 22). And at this point the Court assumed temporary charge of the witness, suggesting and characterizing his testimony, plaintiffs' counsel having duly excepted thereto at folio 37.

6. It was error for the Court to exclude the questions to witness Wakeman: "Q. Do samples 4 (lentil) and 8 (the natural bean in the pod) belong to the same general family or not? Objected to as immaterial. Plaintiffs' counsel: I mean the same botanical family." Same ruling, and plaintiffs' counsel excepted and then asked: "Q. Commercially speaking, are those articles classed in the same commercial class? Defendant's counsel: That is

objected to as immaterial. The Court: The objection is sustained." Exception allowed plaintiff (see Record, p. 25).

7. It was error for the Court to exclude the testimony under the following question, of Walter Carr, plaintiffs' witness, of nearly forty years' commercial experience extending over the class of commodities represented by the samples 3, 4, 5, 6, 7 and 8 before him, who having without objection testified (*inter alia*) (Rec., p. 27) that sample No. 8 was the green pod of the bean plant, and is commercially known as a vegetable, was asked: "Q. Now look at samples 3 and 4 (representing the articles in question). Take up one of them. Take sample 4, for instance; is that a vegetable? A. No, sir; it is not. Q. Describe that article No. 4? Defendant's counsel: I object and move to strike that last answer out;" and the Court granted the motion and sustained the objection; whereupon the exception of plaintiffs' counsel was allowed, "with the same force and effect as if the question had been objected to and excluded and an exception been taken to the refusal to allow the question" (Rec., p. 28).

8. It was likewise error for the Court to exclude the testimony of Walter Carr, a competent witness, under the following question: "Q. Referring to samples 3 and 4 (representing the importations involved), are or are not these articles seeds? *Objected to as immaterial.* Question excluded and an exception to such exclusion was duly taken by plaintiffs' counsel" (Rec., p. 29).

9. It was error for the Court to exclude the testimony of a competent witness on the part of plaintiffs, tendered as to his knowledge of the class of articles included in trade nomenclature under the term "seeds." Thus: "Q. Do you know the class of articles that are *commercially designated* as 'seeds'? Objected to. Question excluded. Exception by plaintiffs' counsel" (Rec., p. 29). [This exclusion illustrates the rulings claimed to contravene this Court's Salomon decision.] It was likewise error to prohibit the inquiry: "Q. Do you know whether

the trade classifications which you have testified to just now are in accord with our common observation?" Exception.

N. B.—The trade usages respecting the classes of articles commercially designated under the term "vegetables" and under the term "seeds" were excluded, and all inquiry silenced as to whether such usages accorded with our common observation; while specific inquiry as to whether the precise articles in question were commercially recognized as "vegetables" or were commercially recognized as "seeds" was prohibited. This is claimed to be error; and the substantive error cannot be escaped by meretricious distinctions ostensibly based on the form of the questions. The testimony was not allowed under any form, however unobjectionable, of question (see preceding assignments). Moreover, such incomplete testimony as escaped obstruction was enough to constitute *some* proofs tending to show the existence of a class of staple articles which were commercially styled "seeds" (Rec., p. 20). Thus, it was claimed to be a matter for the jury to say to which of the two described classes the articles in controversy *commercially* belonged. Witnesses answered this inquiry as to samples 8, but were not allowed to answer this inquiry as to samples 3 and 4, the goods in question. The plaintiffs had testified (fol. 26) that sample 8 *did* belong among the commodities which in commercial usage are styled "vegetables," but Nos. 3 and 4, the goods in question, did *not* "*belong to that class.*" Now either this testimony should have been open to corroboration by plaintiffs when controverted, as it was claimed to be, by the defendant's cross-questionings or proofs, or else it should have been weighed by a jury. That the Court allowed neither is the gravamen of some of these assigned errors.

10. It was error for the Court, that is to say, it was assuredly error in view of the exclusions, if correct, of plaintiffs' tendered evidence in that regard, for the Court *to receive defendant's* proffered evidence relating to commercial usage, which, if properly received, should have been

submitted to the jury. Thus defendant's witness was asked: "Q. From your experience in business, *would any seedsman* buy or sell such articles as are shown by Exhibit 4 as seed for beans? Objected to as immaterial, irrelevant and incompetent. Question allowed. Exception by plaintiff's counsel" (Rec., fol. 72). Under this exception testimony of usages and the merchantability of commodities for seed among certain seed merchants was received (pp. 45-46-47) when proffered in defendant's behalf, but withheld from the jury (Rec., p. 58), under plaintiffs' exception. Similar testimony when offered on the part of the plaintiff (*e. g.*, see preceding assignments of error), had been rigidly excluded by the Court. The reception of such evidence and the previous reception without objection on the part of defendant of some testimony by certain of plaintiffs' witnesses, tending to show intelligible trade distinctions between *vegetables* and the *seeds* of vegetables constitute, it is here claimed, a case that should have been submitted to the jury; *e. g.*, plaintiffs' witness, Wakeman (at page 25), answering a question as to what class, commercially speaking, samples 3 and 4, and 5, 6 and 7 belong, said: "5, 6 and 7 are in a different line entirely and are quoted differently in the journals and are known different from these (3 and 4) goods" (Rec., fol. 43). Articles like samples 3 and 4 "are not classed under the head of 'vegetables' in trade circulars." Also plaintiffs' witness Carr (at Rec., fol. 47), describing the "staple commodities that are commonly dealt in in trade under the style of 'vegetables'" says (at fol. 48), that sample 4 (an import in question) is *not* one of them; both witnesses, so far as they were permitted, giving their reasons and experience with more or less detail of description.

Also plaintiffs' witness Roelker (Rec., p. 38), describing "the class of commodities which commercially are known under the term 'vegetables,' says: "It is a class of articles which come into the market in their green condition for the purposes of consumption. It is the fruit, the edible part; it would be a part of the top of the plant, sometimes the whole of it, * * * either the top or a part of the top, as in spinach; that illustrates my answer. It may include the root also, as in turnips and

carrots, when they are edible;" and the imports sample 3 and 4 do *not* come under that class commercially. This illustrates *some* evidence which plaintiffs claim should have been submitted to the jury, and not annihilated by the Court in more or less consequence possibly of defendant's antagonizing testimony, as to whether "*any seedsman*" would buy or sell such articles as sample 4 as seed for beans, although "some seedsmen might," and others "would not" (fol. 72). The seedsman does not monopolize *all* knowledge of trade usages; and the usages as to both "seeds" *and* "vegetables" were under consideration.

Also, by way of further illustration here, see this evidence resulting upon cross-examination of a witness for the defense from Henderson's seed house: "Q. Can you tell from an inspection of an article whether they are seeds or not? A. In the dry or in the green state, do you mean? Q. Yes. A. They are all vegetables. Q. * * * Can you tell when you see an article whether it is a seed or not? A. What do you mean by 'seeds'? Do you mean *seeds that will germinate, or seeds that are simply grown for the purposes of consumption?* * * * Q. (This answer signifies the trade recognition of seeds for food.) Do I understand you to say you have catalogues of seeds? A. Yes; the seeds of beans are generally the second article in the list. * * * The first column of the index to the book relates to this topic, and that is under the head of 'vegetable seeds.' * * * They are classified there under beans. * * * They (these various beans) are different species of the same botanical family. *They are all seeds*" (Rec., pp. 46-47).

Also, this testimony resulting from cross-examination of a witness for defense from Thorburn's seed house: "The proportion of seeds we import is much smaller than those that are grown here." When we have an order for these lentils "we buy them of some of the produce dealers who import these things for soup purposes" (Rec., p. 45). The plaintiffs in error claim that, unless these "soup purposes" control the case in the Collector's favor, as matter of *law*, this evidence concerning whether these articles belonged or not commercially to the class of

"seeds," should at least have been submitted to the jury. Stress is therefore laid in this assignment of error in the further error elsewhere assigned of failing to submit the case to the jury as requested by the plaintiff at Rec., page 58, folio 89 (see also 16th assignment of error).

11. It was error for the Court, a competent witness being upon the stand, to exclude the question: "Q. Will you describe what are vegetables? Objected to as irrelevant. The Court: Do you mean commonly or commercially? Plaintiffs' Counsel: Commonly. The Court: I will not allow that question. Exception by plaintiffs' counsel" (Rec., p. 38, fol. 62). The description called for by this interrogatory was admitted when tendered by the defense, who read it at once from Webster's Dictionary, under plaintiffs' exception (Rec., fol. 86). (In Solomon Reprint, p. 72, this Court declares the "common" description may be proven).

12. It was error for the Court to allow the witness Carr, whose testimony on the commercial classification of seeds had been refused on his examination-in-chief (Rec., p. 29), to be then asked on his cross-examination: "Q. If a man should come into your place and ask for one hundred bushels of 'seeds,' what would you give him? Plaintiffs' Counsel: That is objected to as incompetent and immaterial, and that it does not arise out of any examination-in chief which had been allowed. Question allowed. Exception duly taken by plaintiffs' counsel" (Rec., p 31).

The record shows that *defendant* was permitted to interrogate witnesses on this topic; but the plaintiffs, whenever the defense objected, were excluded from entering upon the trade usages about "seeds" or common knowledge about vegetables. The latter privilege, however, even to dictionary definitions, was permitted to defendant under exception at folio 86.

13. It was error for the Court, after the witness Walter Carr had testified that the plural nouns "seeds" and "vegetables" indicated in trade and commerce respectively certain established classes of commodities, to ex-

clude his testimony in answer to the following question respecting trade usages: "Q. In dealing in the articles represented by sample 4, is it or is it not necessary in commercial transactions to describe them by some name or other description in order to identify the particular commodity which is the subject of the transaction?" And likewise after the witness had stated that as between samples *4* and *8* the term "bean" would not, without further description, serve commercially to identify one from the other, the same witness was asked: "Q. And is one a vegetable? Defendant's Counsel: That is objected to. A. One is a vegetable. The Court: I will sustain the objection. Strike out the answer with an exception, of course, to the plaintiffs * * *" (Rec., fol. 58). The defence was permitted to interrogate freely as to commercial usages.

14. It was error for the Court to entertain as determinative of the case the *use* of the articles in question, there being no such statutory standard in the tariff clauses in question. Thus the Court declared: "As to use there is no contradiction in the testimony (which was evoked by the defendant under plaintiffs' exception). All the witnesses agree that the predominant use of these articles, both the beans and the lentils, is for food. I shall therefore grant defendant's motion (Rec., fol. 89) and direct 'the jury to find a verdict for the defendant'" (Rec., fol. 95); and plaintiffs duly excepted. The further exceptions to testimony on this topic are to the defendant's questions, as follows: "Q. Have you not often seen beans in a cooked state called 'vegetables' on ordinary bills of fare in restaurants? Plaintiffs' counsel objects. The Court: I should be inclined to sustain your objection except for the ruling of the Supreme Court, by which I shall be compelled to overrule it and give you an exception" (Rec., fol. 29). * * * "Q. What is the predominating use of such articles as Exhibits 3 and 4 (representing the importations involved) in the markets of this country? Plaintiffs' Counsel: We reserve the benefit of an exception to that. The Court: Yes, take an exception" (Rec., fol. 45). * * * "Q. What is the predominant

use of the article 'beans' as represented by this sample—the chief use? Objected to as immaterial. Question allowed and exception duly taken by plaintiffs' counsel" (Rec., fol. 52). * * * Also of another witness (for the defence) defendant asked: "Q. Do you have any beans in your establishment, or has it happened in your experience that they became aged, discolored or anything of that kind; and if so, what is done with them? Objected to as immaterial. Question allowed. Exception by plaintiffs' counsel" (Rec. fol. 67.)

And see the twenty-first and twenty-fifth assignments of error (covering the 5th and 9th requests for instructions) (Rec., page 59).

15. It was error for the Court to grant defendant's motion for the direction of a verdict in favor of the defendant, to which ruling the plaintiffs' counsel had duly excepted. See the motion stated, Record, page 57, and the decision granting that motion at Record, page 58, in the following language: "Lacombe, *J.*: I am unable to differentiate this case from the one which was before me not long ago, Salomon *v.* Robertson, 41 Fed. Rep., 516. There has been some additional commercial testimony here, but I do not see that it has altered the case, in view of the distinction with regard to such testimony which was pointed out by the Supreme Court in the latter part of its decision in the case of Schneider *v.* Barney, 113 U. S. Such additional testimony does not deal in the commercial designations of the article, or what it is called in trade or commerce, or its name. It only tends to show how the trade witnesses think it should be classified. As to use, there is no contradiction in the testimony. All the witnesses agree that the predominant use of these articles, both the beans and the lentils, is for food. I shall, therefore, grant defendant's motion, with an exception to the plaintiffs, and a stay of sixty days."

16. It was error for the Court to refuse the request of plaintiffs' counsel to submit the testimony and "to send the case to the jury" (Rec., p. 58, fol. 89). See tenth assignment of error.

17. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "The articles in controversy, being seeds of the field bean and of the field lentil, are to be classified for revenue purposes under some one of the tariff provisions for seeds, unless this particular kind of seeds shall be found to be more specifically enumerated and provided for, as, for instance, by its specific name, or by some other more definite and exact description applicable specially to them" (p. 58, Rec. fol. 89).

18. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "As matter of law, the jury will understand that there is no specific enumeration by name or by terms of special description in the tariff that individually identifies or separates the particular commodity in question from any and all other commodities of the kind" (p. 58 Rec., fol. 90).

19. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "It being in proof that various kinds of seeds are used for various purposes and have various individual names which aid in their identification, the circumstance that the commodities in controversy are edible and are a staple article of food is not controlling" (p. 58 Rec., fol. 90)

20. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "Nor does the fact that the articles are known as 'beans' or 'white beans,' or 'dried beans' or 'lentils,' withdraw them from the classification of seeds, if they are seeds" (p. 59 Rec., fol. 90).

21. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "The evidence does not justify the jury in basing their determination of the classification in question exclusively with respect to the individual name of the particular article in question or exclusively with respect to its use, but

they must determine the classification upon all of the testimony received" (p. 59 Rec., fol. 90).

22. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel as follows, namely: "Although the commodities in question may be generally sold and dealt in under the simple designation of 'lentils' or 'beans' or 'white beans,' that circumstance in itself does not solve the question as between the rival designations of 'seeds' and 'vegetables'" (p. 59 Rec., fol. 90). Supreme Court language, Salomon Reprint, p. 72.

23. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "If the jury believe from the testimony that the articles in question are, in fact, the dried, matured seeds of the field bean or field lentil, then the commercial name of 'bean' or 'lentil' is not controlling" (p. 59, Rec., fol. 91).

24. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "There is no specific adoption of these articles by the designation of 'beans' or of 'lentils' in the tariff, and that particular commercial name does not control their classification. It is enough to exempt them from duty if they are seeds (not medicinal) irrespective of their use or of their specific name, because such 'seeds' are not elsewhere specifically enumerated or provided for" (p. 59 Rec., fol. 91).

25. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "There being testimony tending to show that there exist commodities besides those in question that are called beans, which beans are not seeds, the name 'beans' does not, as a matter of law, solve the question as between the rival designations of seeds and vegetables" (p. 59 Rec., fol. 91). See Salomon Reprint, p. 72.

26. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely:

"The mere fact that the seeds of the field bean or field lentil are edible does not take them out of the free list. An article may be edible like the seed of the field bean and yet be classified as seeds and also be exempt from duty under the free list" (p. 59 Rec., fol. 92).

27. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "As to what are 'vegetables' and what are the seeds of vegetables, there is testimony tending to show that the commercial usage accords with the common and general acceptation of those terms" (p. 60 Rec., fol. 92).

28. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "The testimony in this case from commercial men agrees with our common knowledge, according to which, unless the article in question belongs to the class of commodities described as 'vegetables in their natural state,' then they are to be classified as seeds not medicinal" (p. 60 Rec., fol. 92).

29. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "If the jury believe from the testimony that 'vegetables' are the edible roots or tops of plants, as distinguished from their dried, matured seeds, then they will find a verdict for the plaintiffs" (p. 60 Rec., fol. 92).

30. It was error for the Court to refuse to instruct the jury, as requested by the plaintiffs' counsel, as follows, namely: "In order to support the claim of the Government that the articles in question are dutiable at 10 per cent as 'vegetables in their natural state,' the jury must be satisfied from evidence that the articles are in their natural state and are in truth the vegetable itself as distinguished from its seed, otherwise they will find against the Government on that claim" (p. 60 Rec., fol. 92).

31. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows,

namely: "To be dutiable as 'vegetables' the commodities must in fact be 'vegetables' as distinguished from seed; they must be something else besides the seeds of vegetables or they are exempt" (p. 60 Rec., fol. 93).

32. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "When a noun of common language is found frequently in the phrases of the tariff as 'seeds' are found, the obvious and ordinary meaning of that term is not to be disregarded unless clearly so intended by Congress, and that intention, in the absence of language evincing it, will not be presumed" (p. 60 Rec., fol. 93).

33. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "The presumption is that tariff terms of general description are to be applied in their ordinary acceptation until it is shown that they have a distinguishable trade meaning, and in this case there is no sufficient evidence to warrant the conclusion that no commodity is a seed unless it is one that is to be used for propogation" (p. 60 Rec., fol. 93).

34. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "The testimony of the opinion of seedsmen is not of itself controlling, and seeds, being mentioned many times in the tariff, must be interpreted to include within the term 'seeds' all the articles which according to the correct use of the language are included within that term, irrespective of the use of the particular seed mentioned" (p. 60 Rec., fol. 93).

35. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "If it is contended by the Government that the term 'seed' has a special commercial meaning and is a term of peculiar commercial designation, then this must be shown by a fair preponderance of evidence; else, being

'seeds' the commodities in question remain exempt from duty" (p. 61 Rec., fol. 94).

36. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "One of the important questions in this case is which is the more definite and particular description of the class of commodities to which the articles in question belong, namely, the class of 'seeds' or the class of 'vegetables,' because the more specific designation prevails; so that if the jury believe from the testimony that the articles in question are more specifically described under the generic term 'seeds' then under the generic term 'vegetables in their natural state,' their verdict will be for the plaintiffs" (p. 61 Rec., fol. 94).

37. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "It is for the jury to say whether the seeds of vegetables are parts of the vegetables or constitute themselves the vegetables, and if the commodities in question are only part of the 'vegetables in their natural state,' as distinguished from the entire commodities 'vegetables in their natural state,' then, if they are only part and not the whole, they are more specifically enumerated under the term 'seeds'" (p. 61 Rec., fol. 94).

38. It was error for the Court to refuse to instruct the jury, as requested by plaintiffs' counsel, as follows, namely: "To justify a verdict for the Government the jury must conclude upon the testimony that the articles in question are not 'seeds' within the rules stated by the Court, otherwise they will find a verdict for the plaintiffs" (p. 61 Rec., fol. 95).

39. It was error for the Court "the foregoing exceptions having been duly taken as aforesaid" to direct "the jury to find a verdict for the defendant," to which direction plaintiffs' counsel duly excepted (Rec., fol. 95).

POINTS AND ARGUMENT.

I.

The classification of an article for customs purposes is not primarily a question of law. On the contrary, no question of law is capable of being raised on that score, except upon descriptions more or less established by evidence. Descriptions may be imperfect, or incomplete, or testimony purporting to describe may be unsatisfactory, or contradictory, or awaken ambiguities of the application or legal operation of tariff terms, and thus the actual classification of an import may become a mixed question of law and of fact. Primarily, it is always a question of fact; and, as the descriptions are developed in testimony, it may prove to be exclusively a controversy of fact. Upon the termination of uncontroverted evidence or upon descriptions thus claimed to be established, there may arise a mixed question of law and fact. But, unless the terminated evidence incontrovertibly establishes a dominating fact or set of facts, which under the statute explicity identifies the classification, the tariff classification of an import may not, properly speaking, be treated as a question exclusively of law.

This is not only true in principle, but in practice and by precedent. For illustration: the statutes prescribe a form of import entry whereon the importer at the offer of his entry denotes the rates of duty applicable and writes his "description of the merchandise." This "description," of course, conforms to some tariff phraseology, or it would be valueless; and in practice it must and does conform to the announced usages of the revenue officials in classifying that type of articles, else the goods would not be "admitted to entry" by the Collector. The latter officer then, under the statutes, causes the merchandise to be inspected, and an administrative conclusion is reached as to whether the merchandise does or does not come within the tariff description proffered in the entry. If not, then the proper tariff description is given instead, and the rate fixed accordingly. This administrative process of

inspection implies more or less expert knowledge, or acquaintance with merchandise and its relations to other merchandise, and possibly to trade and its usages, and comprehends the application of more or less skill and variety of sources of information, or of experience, and usually the weighing of extraneous circumstances having more or less relation to the ultimate fact of the proper tariff classification of the article under inspection. Primarily, therefore, the tariff classification of an imported article is uniformly a question exclusively of fact.

If the conclusion of fact arrived at by this administrative process be erroneous, the party injured resorts ultimately, under the statutes, if he so elects, to the judicial department of the Government. The same inquiry is then begun anew, and in place of the inspection by an official are substituted the senses of witnesses, and their observation and knowledge, perhaps their skill and experience, mingled more or less with their reliability and value. The result is a mixture of fact and of law, to be judicially dissected and its several parts analyzed and respectively weighed before an ultimate result shall be judicially declared. Unless the case as thus developed in the proofs be one where a verdict for one party would be so erroneous as to be set aside on motion, it is not a case exclusively of *law*, but a case, like the one at bar, involving questions both of law and of fact. How much and what part of the case is about pertinent *facts* in issue and what part about *law* necessary to be declared is the domain of the Judge; and, should he err in these respects, his errors come here for correction.

For instance, if a Judge should declare without *any* testimony, upon inspecting a sample of the disputed article, that it had been erroneously classified by the customs officers, and that he, the Judge, was perfectly familiar with that article and needed no testimony, and would hear none, and would not be interested in hearing or detaining a jury to hear details of its descriptive features, because on general principles he thought it should be classified thus and so, and should pay such and such rates, and he would direct the jury accordingly, it would be obvious that an issue of

law had not been properly constructed, and the trial record would not support the judgment, even though the same result might have followed from a full and unexceptionable trial. So in the case at bar the questions of law and the matters of fact must be separated, and, being lawfully distinguished, must be separately adjudged before an adjudication of the legal classification of the disputed import can be judicially attained. Where, in the testimony, as this Court has declared, "there is any discrepancy, however slight, the Court must submit the matter to the jury, because it is their province to weigh and balance the testimony, and not the Court's." (See 9 Wall., 248, noted in Point IX, *infra*.)

An apology might be due for this rehearsal of fundamental principles were it not that the trial Judge, as is claimed here, has so far diverged from them as to have deemed the whole case below, regardless of the testimony delivered or proposed, to have been ultimately disposed of by the opinion of this Court in another case (Robertson *v.* Salomon, 130 U. S., 412). But in that trial the testimony was submitted to a jury; and this course, although excepted to, was *not* here decided to have been erroneous. In that case testimony was received which was rejected in the case at bar, while some testimony, it is true, was erroneously rejected in that case that was in part received and in part rejected in the case at bar. Here the trial Judge has seized one circumstance from out of the evidence, and declaring that "as to USE there is no contradiction in the testimony," * * * and that use being for food, he decides: "I shall therefore grant defendants' motion," to direct a verdict (Rec., fol. 89).

We may as well, therefore, in examining this case, analyze and restate what are the dominant questions of law, and ascertain what portion, if any, of them became decided by this Court in the Salomon case.

II.

In the case at bar, like other instances of disputed customs classification, the legal questions may be distinguished into two well defined classes, viz.: (1) questions arising upon the face of the statute independently of the proofs or the "Record;" and (2) questions presented by particular exceptions in the record individualizing the case at bar.

Among the pertinent questions arising upon the language of the statute that are by no means *moot* questions here, are the legitimate interpretations upon principle and by precedent, to be given to the two tariff provisions involved in this controversy; *e. g.* (*a*), Does the tariff phrase "vegetables in their natural state or in salt or brine, not specially enumerated or provided for in this act," include *parts* of the dried vegetables, *i. e.*, the *seeds* prepared for their propagation that ARE "specially enumerated" and "provided for in this act"? If so, what particular seeds does that phrase include or exclude, and why; and (*b*), Does the phrase "seeds of all kinds, except medicinal seeds, not *specially enumerated or provided for in this act*" include any vegetables that may possess seeds or exclude any seeds that may be obtained from vegetables; and (*c*), Does the use designed for the "vegetables" or for the seeds (not medicinal) withdraw either article from its respectively described class?

These questions may be discriminated as purely of law arising upon reading the language of the statute. No exposition of these legal questions, arising upon the face of the statute, will be found in the record as having been attempted by the trial Judge in the case at bar. The trial below hinged upon or was broken into by, what was supposed to have been decided by this Court (in Salomon case) respecting special features of testimony or of commodities. Before considering further, therefore, either of these statutory questions, or the exceptions that individualize the case at bar, it will prove convenient to notice:

III.

What WAS *decided here in the case of* ROBERTSON *v.* SALOMON, 130 U. S., 412.

It must be conceded that this Court did *not* then decide that lentil seeds were dutiable at ten per cent., even though imported for food. This Court made no pretense in that direction, having no case before it calling for such a decision. For the same reason it must be conceded that this Court did *not* then decide that the seeds of the matured white bean were dutiable at ten per cent., even though chiefly used for food. Assuming for the moment that the case before it called for or warranted such a decision (as it did not), certain it is that this Court neither decided nor declared that proposition to be true as a matter of *law*. True it made some general remarks adverse to the verdict below, which was being set aside, but that result was not reached because the *verdict* wrongly classified the seeds of the white bean as exempt from duty. On the contrary, this Court declined to sustain the Collector's contention at the trial that a verdict should be *directed* for the defendant. The refusal so to direct had been excepted to by the defendant (see Salomon reprint, p. 25, fol. 63); but this Court in awarding a new trial for other stated reasons only added, on this topic, "especially as *without any evidence* (*sic*) and with the common knowledge which we all possess, the Court might *almost* have been justified in directing a verdict for the defendant" (see Salomon Reprint, p. 73). But this Court did *not* decide that the new trial it awarded should "*without any evidence* and with the common knowledge which we all possess" terminate in directing a verdict for the Collector, as the rulings of the trial Judge in the case at bar imply. Had this Court intended so to decide it would have used apt language to that end. Nor did this Court decide as well taken the Collector's exception to testimony showing the jury "what, if anything, is the distinction between vegetables and their seeds" (see Salomon Reprint, p. 14, fol. 34). Nor did it condemn

any part other than a single isolated expression of the charge to the jury of the trial Judge who there expounded the law of that case. Nor did this Court disapprove of submitting to the jury the whole case comprising "a great deal of testimony," which "on the trial the parties deemed it important to introduce" (Reprint, p. 72).

This Court reversed the judgment and awarded a new trial explicitly (1) because the trial Judge erred in excluding testimony about "the common designation of beans as an article of food; and (2) because of the unfortunate expression in the charge to the jury that "the commercial designation of the article or what the article is called in trade and commerce or the name bean has nothing to do with the question." This Court said: "We think the evidence on this point ought to have been admitted;" and "we think the Court erred in this instruction" (Salomon, Reprint, p. 72). We think, therefore, that the Court erred both in its charge, and in the exclusion of the evidence offered, especially as without any evidence (?), and with the common knowledge which we all possess, the Court might almost have been justified in directing a verdict for the defendant" (*Id.*, p. 73). As these errors were of a purely incidental character and not calculated to control the result, and as upon the balance of the charge to the jury as made, and as apparently approved here in that case, the plaintiffs believed a verdict would again be returned in their favor; the further trial as awarded was had in the case at bar.

It is respectfully insisted that nothing except as above stated was decided by this Court in the Salomon case, and that no decision of this Court forbid the plaintiffs in the case at bar from delivering suitable testimony and having it submitted to the jury in accordance with the procedure in the Salomon trial as modified by the final rulings of this Court in the case.

It is important to observe that the Supreme Court in the Salomon case carefully restricted its disapproval of the rulings to the two points mentioned, and condemned nothing else of the full trial whose record was here, and which is

now for convenience reprinted herewith, together with the complete files of briefs and the decision. It must, therefore, be conceded that the unobjectionable portions of the charge of Shipman, *J.*, in submitting that case to the jury, states the law which is applicable and which has *not* been disapproved of by this Court; and at the new trial litigants had a right to assume that the law thus laid down would not be departed from upon a renewed trial of the same matters and in the same Court.

In submitting the case to the jury (a course which this Court refused to declare to be erroneous) Shipman, *J.*, said: "White beans are unquestionably the seeds of the field bean, but the Government claims that they are also, in the universal or general definition of the word, vegetables, and, therefore, come within the term vegetable, which term was in the schedule of the Tariff Act relating to provisions. THIS IS THE ONLY QUESTION OF FACT—are they or are they not vegetables in the ordinary and usual definition of the word? If they are—as white beans are undoubtedly used vastly more for purposes of food than as seeds—they are dutiable at ten per cent." * * * After then stating the respective claims of the opposing parties, the learned Judge proceeds: "It is conceded, and I charge you that a term employed by Congress to designate an article as the subject of duty is to be understood in its ordinary commercial sense, rather than its technical or scientific meaning, *where they differ*. I charge you furthermore, as requested by the plaintiff, that as various kinds of seeds are used for various purposes and have various names, the circumstances that these articles are edible and as a commodity are a staple article of food is not controlling. Nor does the fact that the articles are known as beans, or white beans, or dried beans, withdraw them from the classification of seeds, if they are seeds; and *if you believe from the testimony that vegetables are the edible roots or tops of plants as distinguished from their dried, matured* seeds, then your verdict will be for *the plaintiff*" (see Salomon Reprint, pp. 26–27).

As the Salomon case was in this way submitted to the jury, and these terms and this submission coming under the review of this Court were in effect approved here (see

opinion by Bradley, *J.*, Reprint, p. 73), at all events disapproval explicitly withheld, it must be assumed that upon equivalent testimony the case at bar should have been likewise submitted to the jury. To the extent of this submission and the propositions just quoted from the charge of Shipman, *J.*, an issue is here presented between Lacombe, *J.*, and Shipman, *J.* One or the other cannot be right. Which is to be held erroneous? The merits of this open question are essential on the consideration of this writ of error.

It is respectfully insisted that the foregoing quoted propositions submitted to the jury by Shipman, *J.*, are sound and correctly sum up the law then and now applicable to this case.

IV.

It is further submitted that the *Court below* in the case at bar *did not follow* the decision of this Court in the *Salomon* case; and that the views of the Court below in the case at bar upon the operation and interpretation of the statute—*i. e.*, the particular tariff phrases in controversy—are unsound upon principle, and not sustained by any precedent; and, consequently, that the testimony should have been submitted to the jury with appropriate instructions, and excluded testimony should have been received and likewise submitted.

V.

The Tariff Law Applicable to this Case.

A. What rules are to be observed when two or more phrases of tariff descriptions are more or less applicable to an import undergoing classification? Like enumerations in other writings, firstly, the specific, prevails over the

generic enumeration. But both descriptions may be generic; then, of course, the more particular and definite description will detach its class from the broader association. Thus "watches" would not be held to include "parts of watches" when the latter are separately classified in the schedules; nor "chronometers" to include "parts of chronometers," nor "carriages" "parts of carriages." So "vegetables" would not be held to include "potatoes" when the latter are separately classified in the schedules: nor "wheat," nor "rye and barley," nor "oats," all of which are dutiable by the bushel under separate specification. Nor would "manufactures of wool" be deemed to include "woolen yarns" when the latter are separately specified in the schedule. Nor would "live animals" include "singing birds," otherwise specially enumerated, even in a prior tariff (*Reiche* v. *Smythe*, 13 *Wallace*, 162). Nor would "dried fruits" include "almonds" (see *Homer* v. *Collector*, 1 *Wall.*, 486). Nor would "nuts" or "fruits" or "vegetables" include "walnuts" or "seeds" if "walnuts" and "seeds" were otherwise specially enumerated and provided for.

Mr. Justice Bradley need not have feared that "walnuts" might be classed as "seeds" in the absence of any possible evidence that trade usage or common speech had ever assigned them to that category; and in the presence in the same Schedule G of a tariff phrase for "nuts" as well as for "walnuts," his allusion to walnuts (130 U. S., 414) might be *obiter* were it not justifiable pleasantry.

Tariff phraseology classifies according to the intentions of Congress, however occult, and no matter (as the Court told the jury in the *Zeh* case, 151 U. S., p. 175), whether it "seems to you to be reasonable or not." It might for instance be concededly illogical to associate "wooden toothpicks" and "hickory logs" in the same classification, regardless of the type of material, quality of labor or of trade usages attending the commercial dealings in such articles; and yet Congress might intentionally assimilate them at a uniform rate of customs duty, and disregard the elements of labor, value, and sources of production and use that, in fact, distinguish the one from the other.

Illustration and induction, however logical, are unsafe tests for the application of tariff phrases to articles of import. The true rule is to arrive at the meaning of the words used, and to ascertain by evidence whether the articles in question are ordinarily and commercially recognized as belonging to either class designated by the tariff language; and if belonging to several classes, then to relegate them to the particular tariff class where they are found to be the more specifically denoted.

In *Robertson* v. *Gerdan*, 132 *U. S.*, 454, this Court dismissed the attempt to include pieces of ivory for piano keys within the terms "musical instruments of all kinds," declaring that "the fact that the articles were to be used exclusively for a musical instrument does not make them dutiable as a musical instrument." So an article used at table as a vegetable diet is not for that reason rendered dutiable as "vegetables." The Court observes that the tariff phrases distinguish between carriages and parts of carriages, chronometers and parts of chronometers, watches and parts of watches, &c. (*Ib.*, p. 458). Similarly are "vegetables in their natural state" distinguished from the "seeds" of vegetables, and from flowers and fruits.

It is not the logical or argumentative or actual scientific classification of an import with reference to its genus and species that is of revenue consequence. It is exclusively the tariff classification for collection purposes that is to be arrived at under the application of the ordinary principles of legal interpretation and statutory operation. "Seeds" are not in any sense the "vegetables" themselves; but specific parts of the vegetables which in certain stages include the seeds.

The fundamental law question in the case is, therefore, what import in applying the statute is to be given to the terms "vegetables in their natural state or in salt or brine," "vegetables prepared," &c., and "seeds of all kinds except medicinal, not otherwise specially enumerated or provided for"?

What then are these tariffed "vegetables"? In the sense of the tariff what are vegetables? Not what are vegetable *products*, in a broad scientific or generic sense, nor what are vegetable commodities, according to some artificial trade distinctions or meretricious classification peculiar to commercial dealings.

The learned Judge below (Rec., fol. 89) has implied that the plaintiffs assumed to rely upon some commercial distinctions not concurring with the ordinary import of the statutory language. He assumes that plaintiffs urged upon the tariff phrase a trade signification different from its meaning in common speech, or were in some way colliding with the authority of the case, *Schneider* v. *Barney*, 113 *U. S.*, 645, which the trial Judge quoted. But in that case this Court held: "It *would* have been proper to inquire whether the phrase (goods) 'of similar description' (to delaines) was a commercial term, and if so, what it was understood by merchants and importers to mean." In that case the condemned proposition was in effect to wrest from the language of the statute its unequivocal terms comprehending a class of articles described in the law as goods "*similar* to delaines," and to substitute in the place thereof the *opinions* of trade witnesses as to how they *thought* those articles *should be classed*, irrespective of the established facts touching the alleged *similarity* to delaines by which *the jury* could determine upon the alleged similarity. In that case it was ineffectually sought to fasten upon tariff words and language some peculiar trade signification by which the application should be diverted from a meaning which was unambiguous and common to the English speaking public. It was the same when the effort was unsuccessfully made (in *Maillard* v. *Lawrence*, 16 *Howard*, 251), to show that "shawls" were not "wearing apparel," the latter being a more individual description than "manufactures of worsted." Thus this Court has imposed the true limit to the principle that tariff terms are to be understood in their ordinary commercial meaning. Although, if terms are technical the trade sense is to be shown, commercial usage is not allowed to destroy the common import of language. Trade usage in harmony with the English vocabulary has always been deemed admissible.

That plaintiffs below in no wise sought to intrude on these salutary principles is abundantly established by the record, not only in the interrogatories propounded to witnesses, but particularly in the propositions submitted in plaintiffs' prayers for instruction at record, pp. 58–59–60–61. This record will be searched in vain for any effort on the part of the plaintiffs to intrude upon or to contravene any decision of this Court, or the principles which, in a long line of adjudications upon tariff expressions, have been abundantly expounded.

Attention is respectfully invited to the requests to charge (Rec., pp. 58 to 61), as stating the law upon such topics in conformity with those adjudications, and as refuting (Rec., fols. 93–94) the attitude which the trial Judge below has volunteered to assign to the plaintiffs.

B. In the tariff phrases under inquiry in the case at bar, the descriptions allude to classes of commodities by the names of the *classes*, not by the cognomens of individual articles. The dispute was about what articles were comprehended within the respective classes.

The *names* of the classes were not in dispute, for they are stated in the tariff itself. The *names* of individual articles imported were not in dispute; but, being part of their description, should not be excluded from the evidence tending to describe such articles. This Court explicitly declared that "the *common* designation," as well as "the *commercial* designation" of the article (see *Salomon Reprint*, *p.* 73) was to be considered. This, of course, applies also to *classes.* It was excluded in the case at bar (see second and eleventh assignments of error). This would form part of the evidence by which a fully described article might be ascertained to belong to one or the other of a class, or to several classes; for an article may often belong at the same time to several classes, and then one or more special features of its individuality may assign it to its tariff place. For instance, *green* lima beans in the pod, sufficiently ripe for table consumption, undoubtedly conspicuously include the seeds to the ultimate exclusion of the pod; but not in that

condition the dried, matured "seeds," constituting a trade commodity, or an article of import. The edible top of the plant in its green state, although including the immature seed, is found to be a different commodity from the dried, matured seed of the same plant. An accurate description of the article in one form naturally, as well as in commerce, would assign it to the class of vegetables; while just as naturally that part of the same vegetable, which has been further treated so as to become a commodity in the form only of the dried, matured seed, would naturally, as well as commercially, consign it among "seeds," unless, however—as the Government contends—nothing be "seeds" except commodities designed for propagation.

But this artificial limitation of the noun "seeds" to articles designed for propagation is not sustained by the testimony, does not exist in commerce, is not announced in, but, on the contrary, is refuted by, the various enumerations in the tariff; and, apart from its unscientific and illogical character, is a limitation not true in point of fact. Nor is it true that, while "vegetables" are for food, all food is "vegetables"; not all *vegetable* food constitute "vegetables" (*e. g.* pickles). A *table* sense, whereby vegetable food is distinguished by a generic name from animal food, or from bread, or from other departments of a bill of fare, is not a conclusive tariff test. It may be received in evidence to show a part of the general description and destination of commodities; but it is the *revenue* meaning that is to be ascertained. Is it incorrect to say that when "vegetables" are commodities in their natural state, or in salt or brine, they are plucked green—if from the tops of plants; and if "put up" in some way to preserve them, then they are the "prepared vegetables," which are the commodities of commerce? Are there *any* usages of trade on that score; and if so, what, if anything, have those usages to do with the tariff divisions? On this branch of the case testimony on the part of the plaintiffs was proffered, but was excluded or hedged about by the prohibitory rulings so that its delivery was arrested or stricken out; testimony to a similar end was tendered by the defense, on the other hand, and

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was freely received and encouraged, the defendant's evidence being thus directed to the essence of the defense, that no commodities were "seeds" except those sold for propagation; a proposition, which, as plaintiffs insist, the defendant's trade witnesses utterly failed to establish, and, at any rate, should have been submitted to the jury.

On the other hand, the line of demarcation between "vegetables" as trade commodities, and vegetable *products*, such as grains, fruits, shrubs and plants of various kinds, was easily distinguished, and aptly developed by definitions scarcely susceptible of dispute, either among commercial men or in the accepted English vocabulary. "Vegetables are a class of articles which come into the market in their green condition for purposes of consumption, being generally either the top or part of the top, or the root of the plant" (Rec., p. 38).

"Seeds," says defendant's witness (Rec., p. 40), comprise "all kinds of grain, wheat, rye, oats and corn used for food." This (bean seed) commodity, Exhibit 4, the import in question, is "seed undoubtedly" (*Ib.*, p. 43), says the defendant's commercial expert; we have sixty varieties of them on our catalogue (*Ib.*, p. 42, see also Rec., fol. 74), says another witness (Rec., pp. 42-43), who has also lentils in *his* catalogue, they being to a small extent "sold as seeds by the seedmen of this country." (Rec., p. 44.) These beans were in the seed catalogue of a great seed house whose witness said: "They are all seeds. They are different species of the same botanical class." (*Ib.*, p. 47.) The alleged trade distinction between seeds for propagation and seeds for food relied on by the defence turned out to be based on the *claim* that "seed beans which are raised for propagation bring higher prices than beans raised for food" (Rec., fol. 72), although, as the same witness had previously declared, "*that is not the rule.*" They are, *he* says "better in merchantable appearance," and of course "must contain the germinating property." (Rec., fol. 67.) And a seedsman should "know the history of the production of the seeds" he sells (Rec., fol. 73). But this evidence was not submitted to the jury.

Now, why should the defendant be permitted to adduce

testimony as to whether a particular class of traders, not commercial men generally, would "buy or sell such articles" as the import in question as "seed for beans" (Rec., fol. 72), unless such testimony had some bearing towards fixing the group of commodities which make up "seeds" in ordinary or commercial usage?

The legitimate bearing of descriptions evidencing the group of commodities which are comprised within the term "vegetables" in ordinary dealings or commercial usage would seem equally necessary to be weighed. (That it was excluded, see the first sixteen assignments of error.) All this being within the domain of fact, this *weighing* belongs primarily to the jury. Even upon the defendant's contention and evidence, then, the case should at least have been submitted to the jury, unless the exempted "seeds of all kinds, except medicinal seeds, not specially enumerated or provided for" are to exclude seeds used for food, or designed for other uses than for propagation. The defense insists and the importer denies that this judicial limitation is to be attached to this phrase in the free list; and so recurs the question about the *use* of these articles for food.

VI.

The Fundamental Law Question.

in the case is whether the USE of "seeds," when *use* is not specified in the tariff, shall control their classification. The tariff in this instance is silent as to USE; and this Court having the opportunity did *not* declare that USE was CONTROLLING. The question is, therefore, to be *originally considered* as to the importance of the *uses of seeds* in controlling their revenue classification under the Tariff of 1883. "Medicinal seeds" are not for food; and so *miscellaneous uses are necessarily implied* by the exception in terms for "medicinal seeds" in the tariff phrase in question.

At this point, perusal is respectfully asked of

Point V. at pages 51 to 55 of the accompanying Salomon Reprint. It is to be observed that nothing in the opinion of Bradley, *J.* (*Ib.*, p. 72), decides against that point. The Court below in that case had ruled in accordance with our contention in this regard; and if anything was actually before this Court (which is doubted) calling for a decision as to use being *controlling*, instead of being merely a descriptive incident, certain it is that this Court did not award the new trial upon that ground. True, the opinion momentarily philosophizes thus about the use of beans: "As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are *used* as a vegetable as well when ripe as when green. This is the principal use to which they are put." So, if this use be controlling, why not declare it so, and direct the new trial to be conducted in accordance with such an exposition of the statute. But, as if conscious that such a judicial addition to the statute would not be sound, the Court proceeds to say that "beans," even when signifying beans thus used, "does not solve the question as between the rival designations of 'seeds' and 'vegetables'" (*Ib.*, p. 72). Hence the *doors* were widely *opened* to all *evidence*, and the *jury* approvingly were left to "*solve the rival designations.*" In the case at bar this was denied (Rec., p. 59). Had this Court designed to preclude that possibility at another trial it would have upheld the defendant's exception (Salomon Reprint, p. 25, fol. 63) to the trial Judge's refusal to direct a verdict for the defendant.

This Court studiously withheld its approval of that exception. Hence we submit as sound law, until this Court shall decide otherwise, that under the tariff clauses in question, the proposition announced by the Treasury Department, when it construed (1884) "lentils" to be free of duty, was correct, namely, the instruction to customs officers declaring in this language: "Whether seeds of the character in question are intended for use as an article of food or for planting purposes does not control the question of their classification. They are still to be classed as seeds regardless of the purposes for which intended" (see Record, p. 56, fol. 85).

VII.

It may be an assisting circumstance to observe that under the Tariff (of 1874), in force immediately preceding the Tariff of 1883 in question, the corresponding classification phrase respecting "seeds" read: "Garden seeds, and all other seeds *for agricultural and horticultural purposes* not otherwise provided for, twenty per centum ad valorem" (Sec. 2504, Sched. M. U. S. R. S. Par. "Plants, &c."). Here the *use* designed, meaning the purpose which characterized particular seeds as commodities in trade, or the commercial use, was declared by the language of the statute to be a controlling feature. Hence, when not imported for planting but for food, the Government took an affidavit to that effect, and classified the seeds (*e. g.* beans) at a lower rate than twenty per cent., viz., as an unmanufactured and non-enumerated article, paying only ten per cent. In the reduced Tariff of 1883 a new classification was evolved from this phrase in the Act of 1874, and "garden seeds," except seeds of the sugar beet, were continued at twenty per cent. rate (Rec., fol. 83), while all other unenumerated seeds, except medicinal seeds, were exempted from duty, regardless of their "agricultural" or "horticultural purposes." The omission of these words in the corresponding clause in the 1883 Tariff, it is submitted, may not, upon any recognized principles or authority, be judicially supplied. Their omission, on the contrary, should be judicially considered, and upon precedent and principle be given due weight in arriving at the legislative intent. Fresh in the actual knowledge of that intention, the Treasury Department in March and October, 1884, refused to classify either these white beans, or the lentils as "vegetables;" saying also as to the beans that "*beans of the kind and in the form of the article in consideration as an article of commerce are not vegetables. They are the seeds of the bean plant, which latter is a vegetable;* so paragraphs 286, 287 * * * where mention is made of vegetables do not apply." (Rec., p. 54).

Moreover, the distinction in question was particularly

brought to the notice of Congress by the Tariff Commission Report, Vol. I., page 493, suggesting the precise language adopted in the Tariff of 1883, as to seeds. See its extract in Salomon Reprint, page 53; and again in the Senate, when the paragraph was proposed to be inserted for "vegetables, prepared or preserved of all kinds not otherwise provided for, 30 per cent. ad valorem;" an amendment which was agreed to.*

See Vol. 14, page 2974 Cong. Rec. of 47th Cong., 2d Session.

VIII.

The case of *Nix* v. *Hedden*, 149 *U. S.*, *page* 304 (where the Salmon case is favorably cited), illustrates the futility of attempting to construe tariff classifications by arbitrary definitions, instead of by recourse to the common usages of trade and the affairs of every day life. In that case it was curiously sought to exempt tomatoes from duty as "vegetables" on the ground that they were "fruits," and a citation from some dictionary definition or tradition implying that tomatoes were "love-apples," was relied upon. It could not be established in fact that the class of commodities styled "fruits," being a class designation well recognized in commerce, included "tomatoes," because "tomatoes"

* The Tariff of 1883 was originally based on the report of the Tariff Commission, and came into the House of Representatives from the Ways and Means Committee on Jan. 16th, 1883. Meanwhile "An Act to reduce Internal Revenue Taxation" (H. R., 5538) reached the Senate June 28th, 1882, and was recommitted Dec. 7th, 1882, to the Committee on Finance, which reported it Jan. 4th, 1883, with an amendment embracing an entire revision of the Tariff (Vol. 14, Cong. Rec., p. 816); and it was this act which on Feb. 20th, 1883, the Senate passed, and received back from Conference Committee on Mch. 3d, 1883, on which day it became a law. Under these circumstances there is little of congressional debate to throw light on details of its schedules. Of the two clauses in question, however, Par. 286, that relating to *vegetables*, etc., was enacted as recommended by the Tariff Commission. (See Report of Tariff Com., Vol. I., p. 62.) Regarding the Par. 760 about seeds, the Tariff Commission recommended the following: "Plants, trees, shrubs, and vines of all kinds not otherwise provided for, and seeds of all kinds except medicinal seeds or seeds not specially enumerated or provided for in this act, twenty per cent. *ad valorem*" (*Ib.*, p. 73). In the act as reported to the

were in trade one of the many commodities accepted and recognized and dealt in as "vegetables," and not as "fruits." In this condition of the *facts* the importer's case was necessarily lost on the merits; and so reliance was erroneously placed on hair-splitting definitions of "vegetables" and "fruits," which, of course, were of slight service to any court familiar with the English vocabulary. Unable to furnish proofs that tomatoes were commodities commercially recognized as one of the accepted articles styled "fruits," the plaintiffs sought to rest their case and to secure a direction for a verdict (as Mr. Justice Bradley puts it) "without any evidence and with the common knowledge which we all possess;" and accordingly the case became one where the Court was *not* "*almost*" but *wholly* "justified in directing a verdict for the defendant." Had the facts been that "tomatoes," like oranges, peaches, berries, *et id omne genus*, were uniformly recognized and quoted in trade as one of the commodities commercially styled "fruits," the case might have gone to the jury, under proper instructions from the Court. As the case stood, it is without application to the record at bar, in a case presenting testimony claimed on each side to assign the controverted commodities to the respective commercial classes of "seeds" and "vegetables."

In the same way the *name* "lentils" or the name "white beans," while part of the essential description, does not *per se* (as Mr. Justice Bradley observes) solve the ques-

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Senate this wording was followed except that the "twenty per cent. *ad valorem*, was omitted and the clause so amended was transferred to the free list (47th Cong. 2nd Sess., Senate Misc. Doc., Vol. 2, p. 17. During the Senate discussion, an amendment was made to include, "Garden seeds, except seeds of the sugar beet, twenty per centum *ad valorem*" (Cong. Rec., Vol. 14, pp. 2219, 2220, 2530, 2631). As enacted the act contained that amendment; and the free list the following: "Plants, trees, shrubs and vines of all kinds not otherwise provided for and seeds of all kinds, except medicinal seeds, not specially enumerated or provided for in this act" (Official Tariff, Par. 760). The *rate* as to vegetables also enjoyed special attention, for it was proposed in the Senate (see same volume, p. 9274) to insert "Vegetables, prepared or preserved, of all kinds, not otherwise provided for, 30 per cent. *ad valorem*."

Mr. Cockrell: I should like to ask the Senator if that is not a pretty high rate considering the rate just above it for vegetables in their natural state at 10 per cent.

Mr. Morrill: They are now at 35 per cent., and I propose they shall be at 30. The amendment was agreed to. (*Ib.*)

tion as between the rival designations of "seeds" and "vegetables" (see Salomon Reprint, p. 72). One reason for this, for instance, is that "beans" may refer to sample 4 or sample 8, to the "seeds" *or* to the article in the pod, or "the plant from every stage up" (Rec., fol. 52); and as the Tariff of 1883 omits mention of beans, some further description beyond the simple name "beans" is requisite to fix the classification. If this be a tariff defect it is remedied by the tariffs of 1890 and of 1894, which schedule (1890) beans at forty cents per bushel, and beans prepared, &c., at forty per cent. ad valorem (Tar., par. 270, Sched. G.); while "garden seeds, agricultural seeds and other seeds not specially provided for," are thus named (par. 286) at twenty per cent. ad valorem; rye at 10 cents bushel (par. 262); wheat at 25 (par. 264); barley at 30 (par. 252), and buckweat at 15 (par. 255). The tariff of 1894 preserves substantially the same nomenclature, but with different rates (see Sched. G, Act 1894).

Is "buckwheat" a "vegetable" in the tariff sense, because its use is for human food; or "wheat" or "rye" or other "seeds" commonly styled "grains"? If some of these grains were not enumerated, they would fall under the tariff enumeration of "seeds," where all the unenumerated grains must be assigned, unless some proofs of usage can place them in a more appropriate assignment. The proofs of usages about "seeds" are clear that the dried natural seeds, "containing the first original principle of production" (fol. 48), capable of propagating their kind, constitute, and according to the accepted English vocabulary, comprise the *commercial* class of "seeds." Indeed the commercial class and the botanical class concur (Rec., p. 47). Any definition, commercial or other, that can be given to the term "*seeds*," will include these "*lentils*" and *these* "beans." "The whole lentil comes as a vegetable and these are the seeds"; is the testimony in this Record, fol. 21.

But the Government urges that nothing is "seed" unless it is to be planted. This is not the tariff sense; nor in harmony with the proofs in the case at bar. Some seeds are used medicinally; others for oil; others for forage, or for food for birds; others for human food (Rec., fol. 63). Some for mechanical and manufacturing or

scientific purposes only. Some as dyes and drugs. Aromatic seeds are mentioned in the tariff also, and seeds of morbid growth; and non-edible seeds advanced in manufacture by grinding, &c.; and non-edible seeds not so advanced (Rec. pp. 50 to 52).

These various uses of imported seeds, including seeds for food purposes, were obviously contemplated by the tariff makers, as well as carefully provided for.

Indeed, the Tariff of 1883 contains intrinsic evidence in its own phraseology that seeds of various sorts were to be variously classified under various descriptions; and in the light of these terms it is obvious that USE, when not stated, was not designed to dominate in fastening articles of seeds within the residuary clause for "seeds of all kinds, except medicinal, &c." Thus the following are instances of seeds mentioned: "Seed cane and seeds imported by the Department of Agriculture or the United States Botanical Garden (Tariff Index, par. 761); linseed or flaxseed (*Ib.*, 466); miscellaneous drug, aromatic and other seeds (*Ib.*, 94–636); canary seed (not for planting but food) free (*Ib.*, 760); canary, coriander, mustard, cardamon, sesamun, besides wheat (*Ib.*, 259); rye and barley (*Ib.*, 260); oats (*Ib.*, 264); garden seeds (*Ib.*, 465), except seed of the sugar beet (free), hempseed, rape seed, oil seeds (*Ib.*, 452), and numerous seed commodities for diverse uses classified perhaps illogically but regardless of their propagating or gustatory qualities (see further enumerations, Record, pp. 50, 51, 52, &c.).

IX.

The plaintiffs claimed that there was a class of commodities commercially recognized as "seeds," and that their articles (samples 3 and 4) besides being seeds in fact, did in trade belong to that class of articles. Plaintiffs' proofs to this point were excluded; and such incidental or opposing testimony as got through the bars was withheld from the jury; and both rulings are assigned for error.

"The object of the duty laws (said Mr. Justice Story), is

to raise revenue, and for this purpose to class substances according to the general usages and known denominations of trade. * * * It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic" (quoted from *Lutz* v. *Magone*, 153 *U. S.*, *p.* 108).

The captions of the tariff schedules are not intended to be an accurate description of the articles within the particular schedule (*Hollender* v. *Magone*, 149 *U. S.*, 586), so neither the titles "Sundries" nor "Provisions" decide this case. Nor do the invoices, and "the various questions of utility and adaptation of the merchandise imported are not supposed to enter into the decision of the Collector in determining the dutiable classification" (*Dwight* v. *Merritt*, 140 *U. S.*, 219).

So competent evidence is to be received to describe the article and the commodities to which the disputed tariff phrases may respectively relate.

As was said by this Court in *Barney* v. *Schneider*, 9 *Wall.*, 248, in condemning a refusal to submit a disputed classification to the jury, the issue is "one of mixed law and fact, because until we are informed by testimony of the nature and character of plaintiffs' goods no construction or view of the law can be applied to them. * * * The Court can only know by evidence what kind of goods were assessed by the collector, and this at once dispels the idea that the case could in any sense present an abstract question of law. * * * The Judge tells us that there is very little discrepancy in the testimony. But where there is *any* discrepancy, however slight, the Court must submit the matter to the jury, because it is their province to weigh and balance the testimony and not the Court's. The proposition therefore is not sustained, that there is nothing but a question of law to be decided," and a verdict avowedly directed because of the Court's *judicial knowledge* of the articles in question was set aside.

In Seeberger *v.* Schlesinger, 152 U. S., 582, this Court observed: "The commercial designation of an article, however, is not a matter of which courts can take judicial

notice, but is a fact to be proved like any other—by evidence" (*Ib.*, p. 585). So a commercial *class* of articles described by a class noun is to be shown by proofs. Moreover, in the light of such proofs, it may transpire that one tariff clause is to prevail over another, because it "was narrower and more limited than the other" of two clauses, both confessedly embracing descriptions of the goods in question (*Ib.*, p. 588).

In *Magone* v. *Keller*, 150 *U. S.*, 70, the trial Court directed a verdict after refusing the defendant's request to go to the jury upon the question whether the article in suit was a substance expressly used for manure, a question held by this Court to be one of fact "to be determined by the jury upon consideration of all the evidence and of the comparative credibility of the witnesses," although the article was sulphate of potash, one of the chemical products specified as dutiable in Schedule A. This Court in reversing the judgment declared that an article which might be described by name in Schedule A, might also be exempt from duty if further and more specifically described in the free list (*Ib.*, 73).

In *Hedden* v. *Richard*, 149 *U. S.*, 346, this Court said: "That as the Collector offered to prove that the (tariff) word in question had at and prior to the passage of the Act of 1883 a particular trade meaning, the Court should have considered the trade meaning, if established, as applicable to the matter at issue, and should have submitted the case to the jury," &c., instead of erroneously directing a verdict upon the testimony relating to whether the article was "furniture finished," or "in piece, or rough and unfinished." These were terms common to the English vocabulary, but their acceptation in trade was under investigation, in the same sense that "vegetables in their natural state or in salt or brine," is in the case at bar to undergo explanation towards ascertaining the articles thus comprehended. Even by the testimony adduced on the part of the defence the plaintiffs claimed to have shown their articles to belong to the commercial class of "seeds"; and upon this testimony the jury should have passed.

As the evidence in the case at bar even as incompletely received leaves no question that for all purposes of trade "vegetables" is a term designating "a class of articles (Rec., p. 35), and refers to the edible roots or tops of plants as distinguished from their dried natural seeds (Rec., fols. 48, 62), and that the merchandise in controversy is not recognized as within that class, but is distinguished therefrom by being its seed, the verdict should not have been directed for defendant; and the evidence should have been submitted to the jury.

X.

Notes of Cases.

In *Cadwalader* v. *Zeh*, 151 *U. S.*, 171, there was one rate on "toys" and a higher rate on decorated "earthen, stone and crockery ware," under which the disputed articles were assessed. The plaintiffs were permitted to call trade witnesses showing "a class of goods in their business made of earthenware * * * commercially known and designated, bought and sold as toys" (*Ib.*, 172). * * * With the approval of this Court the jury "were instructed that the word 'toys' in common speech means playthings for children; that the word was to have that meaning in this case unless the evidence showed * * * it had a different trade signification, that is, that it was differently used and understood when applied to such merchandise by those engaged in commerce respecting it, and that if it then had a well known trade signification the statute must be understood as using it in that sense" (*Ib.*, 175). * * * "Witnesses on both sides testified that there was a class of earthenware goods commonly known in trade and commerce as toys (*Ib.*, 178). They differed, indeed, upon the question whether these articles came within that class;" and so this "was a matter for the consideration of the jury," instead of deciding "by the opinion of jurors based upon their personal knowl-

edge or experience" (*Ib.*, 179). (Similarly in the case at bar the word "seeds" in common speech signifies that part of the vegetable product which is dried and matured and by means of which the plant is ordinarily propagated;) that the word is to have that meaning in this case unless the evidence shows it had a different trade signification; "that the evidence seemed to put it beyond a doubt that the term had a well understood trade signification, * * * and was in common use among those engaged in this branch of commerce," the witnesses differing "only as respected the scope of its application;" and the instructions to the jury concluded: "If you find that the term in question has a well known trade signification, and that these articles fall within it, your verdict must be for the plaintiff, no matter whether you believe the trade designation seems to you to be reasonable or not" (*Ib.*, 175).

This instruction is explicitly approved by this Court, and comprehends the precise claim made in the case at bar, simplified, however, here by the absence of any proofs, as the importers claim, that the trade usage transgresses the English vocabulary; and fortified by the irrefutable proposition that the word "seeds," signifying a particular part and a particularized maturity of that part of a "vegetable," is a more specific and individual description of an article than the words "vegetables in the natural state."

Moreover, the instruction last above quoted furnishes the correct as well as most recent authority of determining whether the lentils and white beans in dispute fall within the trade signification of "vegetables in their natural state." Measured by this announced rule, the testimony, as the importers urge, renders it impossible to arrive at a conclusion that the "seeds" are ever commercially commingled with their "vegetables in the natural state." In any event the jury and the evidence furnish the standards to determine this rather than the opinions of jurors or of judges formed "upon their personal knowledge or experience."

In *Maddock* v. *Magone*, 152 U. S., p. 371, this Court upheld the inquiry "whether in a commercial sense the articles were so known, trafficked in and used under the

denomination of toys, that Congress in the use of the particular word should be presumed to have had that designation in mind as covering such articles" (as the diminutive cups and saucers then in question); and condemned limitation of such inquiry to "one trade or branch of trade or in one part of the country, partially or locally, and not uniformly and generally" (*Ib.* 372). But in the case at bar the trial Court admitted evidence towards an alleged trade usage excluding these lentils from the "seed" classification, and further inferred that the fact of such exclusion was irrefutably established, while the importer urged that the proofs really negatived such a contention. This Court observes that a trade usage from which it may be inferred that Congress intended to use particular words in a particular sense so as to affect a general enactment in the tariff, "must be definite, uniform and general, and not partial, local or personal" (*Ib* p. 371). Such issues under suitable instructions are the province of the jury.

In *Boyle* v. *Magone*, 152 *U. S.*, 623, there was a controversy upon dutiable imports assessed as "sauce" and claimed to be "fish preserved or prepared." The Circuit Court had directed a verdict for the Collector on the ground that the term "sauces of all kinds" in the Tariff act was a descriptive term of ordinary meaning and not to be taken in its trade meaning; *thus ruling* in substance (as the Supreme Court declared) "that *as matter of law*, and without regard to commercial usage, these articles (anchovy paste and bloater paste) came within the words 'sauces of all kinds' in the Tariff act. We are unable to concur in that view, or to say either of our judicial knowledge, or in view of the evidence introduced that these articles are necessarily 'sauces' of any kind; still less that this is so clear as to exclude the usual test of commercial designation." So the verdict directed was set aside and a new trial ordered, that the evidence of the nature of the articles and of trade usage should be submitted to a jury.

In *Toplitz* v. *Hedden*, 156 *U. S.*, 252, the Collector was defending an assessment as woolen "knit goods" upon articles which being "Scotch caps" were claimed to be dutiable under a lower rate as "bonnets for men." A witness was asked to state whether "these goods were

known in trade and commerce as bonnets for men;" and the question being allowed over an objection, the exception taken was not sustained by this Court. The evidence was held to have been properly received in that case, and having been admitted doubtless decided the case, for the answer was "No, sir." So in the case at bar, when a witness was asked if the articles in question were "seeds" (Rec., fol. 29), and was then asked to tell the "class of articles commercially designated as "seeds" (so the jury could assign the disputed articles to their place), the answer in the case at bar, if from a qualified witness, might have determined this case; but the proof was excluded in every form. So when witnesses were asked if these goods (lentils and white beans), Nos. 3 and 4, were known commercially as "vegetables," one or more qualified witnesses answering that excluded question in the negative would have tended to end all controversy over either of the present articles. The exceptions therefore stated in the assignments of error are urged as meriting a new trial.

For instance: Refusals to receive from qualified witnesses evidence in response to the topical inquiries: What are the articles that are commercially known as 'vegetables in the prepared state' and 'vegetables in their natural state'? What are the varieties? (2d Spec. of Error). Do samples 8 represent the commercial class styled 'vegetables'? (3d *Ib.*) Distinguish from all the samples 3, 4, 5, 6, 7 and 8 those, if any, which by commercial usage are recognized as 'seeds' and those recognized as 'vegetables'; and tell what, according to commercial usage, are 3 and 4, the imports in question? (4th *Ib.*) Describe 3; and the testimony was arrested and stricken out; (5th *Ib.*) Do samples 4 and 8 belong to the same commercial class? Describe 4? (6th and 7th *Ib.*) Are or are not samples 3 and 4 'seeds'? calling of course for the commercial usage. Do you know the class of articles included in trade nomenclature under the term 'seeds.' (8 and 9th *Ib.*) Will you describe what are vegetables? (11th and 13th *Ib.*) For, in the language of this Court, in *Salomon* (Reprint, p. 72) v. *Robertson*, to style an article "beans" or "lentils" does "not solve the question, as between the rival designations of 'seeds' and 'vegetables.'"

XI.

Is it not idle to argue that the case at bar presented below no dispute of fact and only a single question of law? It presented several questions of law dependent upon the testified descriptions received or offered, and a controversy of fact upon any of the descriptions completely or incompletely delivered at the trial.

For example, here are five salient and essential issues of fact that belong to the province of the jury, viz.:

1. Was there any well known signification in trade and commerce respecting the words "vegetables in their natural state" as used in the Tariff of 1883?

2. Was there any trade usage distinguishing the class of merchandise comprised within that description?

3. Did such usage, if any, accord or differ from the common and ordinary significance of the words used?

4. The defendant claimed that in respect to the term "seeds" there was a commercial usage such as would exclude the articles in question. The importer controverted this contention.

5. The defendant claimed that in common speech the term "seeds" did not comprise the merchandise in question. The importer claimed the contrary.

Here were at least five controversies of fact essential to the issues before the Court; and until these controversies of fact were settled—as was possible only by the jury—there was no question of law for the Court to decide that would necessarily classify the disputed merchandise.

Names, common or commercial, of individual articles or of classes, and usages of trade or of multifarious life

are all to be given their due weight in arriving at the conclusion of facts upon which depend the ultimate classifications.

All this was denied to plaintiffs in error by the trial Court.

XII.

Conclusion.

For errors assigned a new trial should be ordered.

HENRY EDWIN TREMAIN,
In behalf of Plaintiffs in Error.

Office Supreme Court, U. S.
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CASE No. 14544.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

HYMAN SONN ET AL., PLAINTIFFS in error,
v.
DANIEL MAGONE, COLLECTOR OF the port of New York.
No. 16.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

This was an action to recover duties overpaid. The importations were made in the years 1887 and 1888, so that the case is governed by the tariff act of 1883. The articles imported were lentils and beans. They were classified by the collector as *vegetables*. The importers claimed that they should have been classified as *seeds*. The case was tried before Judge Lacombe and a jury, and a verdict directed for the defendant. The importers claimed that they had a right to go to the jury.

There are a large number of exceptions in the evidence, but these were nearly all cured, as will be pointed out further on, by subsequent admission of the testimony, the exclusion of which was the basis of the exceptions.

STATEMENT OF FACTS.

The articles were invoiced as "hand-picked beans" (p. 14).

They were not string beans, or beans in the pod, but the mature bean in a dry state. They consisted of two varieties. "Sample 3" was a lentil. "Sample 4" is called by the plaintiff a "field bean" (p. 9), but by his main witness, Mr. Wakeman, defined as the "white medium bean" (pp. 24, 26). The main use both of the lentils and of the beans is for food (pp. 16, 26, and 32). Sometimes some are sold for seed, and plaintiff claimed to recollect one small sale out of one of the importations in suit, which the purchaser informed him was for this purpose (pp. 19–20). Plaintiff's witnesses testified that the value of these lentils and beans was somewhat increased by the fact that they could be used as a seed, although that was not their main use (pp. 24–25, 29).

An attempt was made by plaintiff's witnesses to show a *commercial designation* transferring these particular beans from the general class of vegetables into that of seeds. Naturally enough, however, it appeared that they were never bought and sold under the name of seeds, or under the name of vegetables either, these words being too general for use in actual commercial transactions. They were bought and sold simply as beans, or lentils, as the case might be (pp. 15, 25–26, and 39). In fact,

even the word "bean" is not specific enough, but the actual sales were made under even more specific names, as "medium," "marrow," "kidney," etc., beans (pp. 24–25, 35–36). The testimony in support of the claim of commercial designation related not to any actual use of language in commercial transactions, but to alleged general principles of classification resting in the minds of commercial men, and to the headings used in certain trade circulars claimed by these witnesses to be of the highest authority. The general distinction taken by these witnesses was that a vegetable must be green, although either the seed, root, or top of a plant might be properly called a vegetable; but that if the seed was matured and dried it thereupon ceased to be a vegetable and became only a seed. (See pp. 22, 28, 33, 37.)

All this classificatory testimony, however, related to the *time of trial in 1891*. It was admitted by Mr. Carr, plaintiff's main witness on this point (p. 28), that—

> There were "green vegetables" *and* "*dry vegetables*" known in the trade *in 1883*. There was a distinction between them in the trade. That is not the reason I put the words "green vegetables" on my last circular. * * * In my two other circulars which were marked for identification I have used the term "vegetable," but not "green vegetables." It amounts to the same thing (p. 33).

The tariff provisions bearing on the present suit are the following:

> Par. 286. Vegetables in their natural state, or in salt or brine, not specially enumerated or provided in this act, 10 per cent ad valorem.

Par. 452. Hemp seed and rape seed, and other oil seeds of like character, other than linseed or flaxseed, ¼ of 1 cent per pound.

Par. 465. Garden seeds, except the seed of the sugar beet, 20 per cent ad valorem.

Also the following paragraph in the free list:

Par. 760. Plants, trees, shrubs and vines of all kinds, not otherwise provided for, and seeds of all kinds, except medicinal seeds, not specially enumerated or provided for in this act.

PRECEDENTS ABOUT VEGETABLES.

One of the peculiarities of this case is that it relates to articles which had already been the subject of discussion by this court when the case was tried; and the course of events at the trial was evidently much affected by endeavors to bring the case within certain *dicta* then made. The case we refer to, namely, *Robertson* v. *Salomon* (130 U. S., 412), was decided April 15, 1889, and like the present case raised the question whether lentils and white beans, matured and dried, are to be classified in the tariff law of 1883 as seeds or vegetables. The present case was tried January 15, 1891. Subsequently, in the case of *Nix* v. *Hedden* (149 U. S., 304), decided May 10, 1893, this court had before it a question very similar, namely, whether tomatoes were vegetables or fruit.

In *Robertson* v. *Salomon* the trial court left to the jury the question whether beans and lentils were vegetables or seeds, cautioning them not to consider the testimony offered as to the commercial meaning of the word

"vegetables"; and having already excluded certain evidence offered with relation to its vernacular meaning.

Under these circumstances it may be convenient to describe and consider these decisions before proceeding to the argument of the various exceptions taken in the present case.

Robertson v. Salomon.

Julius M. Fairchild, a witness called by the defendant, testified that he kept a restaurant in Park Row, New York, known as the "International Dining Room." In his testimony, after qualifying him as an expert restaurant man, the following occurred:

> Q. As an article of food what is the common name given to those beans?
>
> (Objected to as immaterial and irrelevant.)
>
> The COURT. I do not think you can prove a commercial designation in that way.
>
> COUNSEL FOR DEFENDANT. We do not desire to prove the commercial designation by this witness, *but the common designation.*
>
> The COURT. I do not think I can permit that from the testimony. I will exclude that question.
>
> (Counsel for the Government excepts.)

This witness further testified that he raised beans in the garden and field both; that he had raised them in his garden among other vegetables, and sells them cooked as an article of food.

> By DEFENDANT'S COUNSEL:
>
> Q. Under what name?
>
> (The question was objected to by counsel for the plaintiff, which objection was sustained by the court, to which ruling defendant's counsel duly excepted.)

Frederick Keith, manager of the Astor House restaurant in New York, was also qualified as an expert restaurant man, saying that in his establishment beans were used as food at the rate of about a barrel every ten days, this kind of beans being used baked or in soup.

He was then asked by defendant's counsel:

> Q. What are they commonly called when baked? (This question was objected to by counsel for the plaintiffs and objection sustained by the court, to which ruling of the court defendant's counsel duly excepted.

These rulings were assigned for error in this court by the then Solicitor General, Mr. Jenks.

Mr. Justice Bradley in delivering the opinion of this court reversing the judgment below (the jury having found a verdict at the trial for the importers) made the following remarks:

> The common designation as used in everyday life when beans are used as food (which is the great purpose of their production) would have been very proper to be shown in the absence of further light from commercial usage. We think that the evidence on this point ought to have been admitted. * * * If the commercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation. We think, therefore, that the court erred * * * in the exclusion of the evidence offered, especially as without any evidence and with the common knowledge which we all possess the court might *almost* have been justified in directing a verdict for the defendant. (130 U. S., p. 415.)

The evidence in *Robertson* v. *Salomon* was conflicting upon the point of commercial designation. Plaintiff's witness, Walter Carr (also a witness in the case at bar), testified that commercially "vegetables are the edible roots and tops of plants as distinguished from dried seeds." Mr. Deininger, the next witness, testified that he had "never known that a bean was a vegetable, not even in the pod"; that he had "no other name for them than beans. * * * Under the head of vegetables beans and pease are also sometimes mentioned in the summer season; not ripe beans—green beans, green beans of course in the pod; it grows in the country and they put them under the head of vegetables. The plaintiff's samples here are dried beans. * * * Baked beans are never called vegetables." Mr. Wakeman, also a witness in the case at bar, testified that he did not know the articles "by any other classification except beans." Defendant's witness, Mr. Reed, testified that prior to March 3, 1883, "just such beans as these that were imported" were excluded, commercially speaking, from the class of seeds.

The court in its charge used the following language, to which defendant's counsel duly excepted: "The commercial designation of the article, or what the article is called in trade or commerce, *or the name bean* has nothing to do with the question."

On this point Mr. Justice Bradley said:

> We think the court erred in this instruction. The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. * * * We think, therefore, that the court erred * * * in its charge.

The opinion, therefore, lays down two propositions in respect to beans: First, that the question whether they are seeds or vegetables is primarily to be settled by their commercial designation; and second, that if evidence of commercial designation fails *witnesses may be called and examined to prove the common meaning of the words "vegetable" and "seed" in the vernacular.*

If this latter proposition be regarded as not *obiter* but as the established law, then the following propositions would seem to follow: First, the meaning of the word "vegetable" is not subject of judicial notice, for if a court *judicially* knows a particular thing to be true it can hardly allow the truth to be disputed by oral testimony and then leave it to the consideration of the jury; second, the jury, equally with the court, are in need of expert assistance in order to properly understand the common meaning of the English language; and therefore, third, it is proper to call experts to instruct the jury, not as to technical terms of trade, but as to "common designation as used in everyday life" as Mr. Justice Bradley puts it.

Nix v. Hedden.

In this case the trial court, considering the preliminary question whether tomatoes were vegetables or fruit, held that the word "vegetable" was one whose common meaning the court knew judicially, and therefore should not leave to the jury. It appearing by the evidence of the witnesses in that case that the words "fruit" and "vegetable" had no special meaning in trade and commerce, and the dictionary definitions having been read by the counsel for the respective parties, the court directed a

verdict for the defendant, holding tomatoes to be vegetables, and not fruit, within the meaning of the tariff act.

Plaintiff's counsel excepted to the direction of the verdict, insisting that the question was one for the jury, and in his brief in this court made the following argument (Brief, pp. 19–21):

> It was error to direct a verdict against us. The cause should have been submitted to the jury, unless the direction was given in our favor upon the testimony. We did not ask such direction, because we felt that at the very least we were entitled to have the cause submitted to the jury under proper instructions. * * * The term to be construed and applied was not specific, but descriptive; not the one article named in our invoice, but a class of which our importation was a member. * * * Wherever words describing a genus are employed in a tariff the question whether or not an unmentioned species belongs to it is not a matter of mere judicial cognizance.

This court, however, affirmed the decision of the trial, Mr. Justice Gray delivering the opinion, as follows:

> There being no evidence that the words "fruit" and "vegetables" have acquired any special meaning in trade or commerce, they must receive their ordinary meaning. *Of that meaning the court is bound to take judicial notice* as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but *only as aids to the memory and understanding of the court.* * * * In the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner

> in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not like fruits generally, as dessert. The attempt to class tomatoes with fruit is not unlike a recent attempt to class beans as seeds.

The court then cites with approval a passage from Mr. Justice Bradley's opinion, above cited, holding that when beans are found "on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable as well when ripe as when green," etc.

The ruling in *Nix* v. *Hedden* that the court takes judicial notice of "the meaning of words in the vernacular language" is amply sustained by the authorities. (*Brown* v. *Piper*, 91 U. S., 37, 42; 1 Greenleaf on Evidence, § 5 and cases cited; 1 Taylor on Evidence, § 14; and tariff cases cited, III, *infra*.)

If we are right in supposing that evidence can not be left to the jury upon a point as to which the court has judicial knowledge, and that expert testimony is inadmissible upon matters of common knowledge (IV, *infra*), then we take it that the opinion given in the case of *Robertson* v. *Salomon* is to be regarded as overruled and of no present authority, so far as it tended to sustain defendant's offer of expert testimony as to the vernacular.

ARGUMENT.

I.

The evidence admitted under the head of commercial designation was insufficient to take the case to the jury.

(A) *The evidence was directed to the wrong date.* There is not a particle of evidence tending to show that the word "vegetables," as used on and prior to March 3, 1883,

failed to include edible beans of any kind. The evidence on this point was all directed to the time of the trial, and all concerned alleged usages contemporary with the trial in 1891.

It was settled as long ago as the case of *Curtis* v. *Martin* (3 How., 106, 110), that the commercial usage to be proved must be contemporaneous with the passage of the tariff act under consideration.

It is well established that proof of a usage in 1891 is not assisted by any presumption that the usage was the same in 1883. The latest authority in point is the recent china toy case, already often cited, of *Cadwalader* v. *Zeh* (151 U. S., 171, 179). In that case Mr. Justice Gray delivered the opinion of the court, upon the point now raised, as follows:

> The only other exception argued is to the exclusion of the testimony of two witnesses as to what each of them was told upon inquiring for such articles at a large toy shop in Philadelphia *just before the trial*. This testimony was rightly excluded. * * * If such testimony could have been competent under any circumstances to prove a commercial meaning (which we do not intimate), *it certainly had no tendency to prove what that meaning was at the time of the passage of the act of 1883.*

A parallel case is *Rossman* v. *Hedden* (145 U. S., 561, 570). The rule is a general one, not peculiar to tariff cases. (Endlich on Interpretation of Statutes, § 83; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429, 558.) So far as the case of *Pickhardt* v. *Merritt* (132 U. S., 252) holds to the contrary it must be regarded as overruled.

We are not left by this record, however, to mere presumptions. Plaintiff's own witnesses affirmatively proved that in 1883 there was a class of substances known as "dry vegetables" or "dried vegetables." That class was distinguished from the "green vegetables," which, as the witness testified, were the "only vegetables properly speaking." Dried vegetables seem to be excluded by plaintiff's other witnesses also from the commercial class of vegetables recognized by them. Their testimony all related to the time of trial. It is, therefore, clear upon this record that the custom changed between 1883 and 1891. Perhaps this was one of the cases referred to by the Chief Justice in *Maddock* v. *Magone* (152 U. S., 368, 372), in which the commercial designation varies with the tariff rates.

(B) *The testimony is also insufficient because it fails to show a commercial denomination actually used in trade.* As said by Judge Lacombe in directing the verdict (p. 58):

> Such additional testimony does not deal in the commercial designation of the article or what it is called in trade or commerce, or its name. It only tends to show how the principal witnesses think it should be classified.

It is admitted that the articles are never either bought or sold under the name of seeds or under the name of vegetables. The plaintiff indeed stated that he, individually, sometimes used the word "seeds," correcting his customers in that respect, so that if the customer asked for the "field pea bean" plaintiff would ask him "whether he wanted the field pea bean or the seed of

the field pea bean" (p. 18). This is not enough, however, to make a commercial designation. (*Berbecker* v. *Robertson*, 152 U. S., 373.)

While the authorities have been very liberal in admitting evidence of commercial designation, liberal to such an extent as to render uncertain and subject to the perils of oral testimony a large part of our tariff legislation, nevertheless it is respectfully submitted that the court has never allowed the ordinary English meaning of words to be changed except by evidence of commercial *denomination*, as distinguished from mere commercial *classification* by words not belonging to the actual language of trade. In other words, while the court has in most cases freely admitted evidence of the language customarily used by merchants and tradesmen in buying and selling goods, it has never yet subjected to oral evidence words never used in actual transactions, except in cases where the statutes use words which have no vernacular definition or the articles in question are not known to consumers, so that the vernacular definition fails of application.

In *Robertson* v. *Salomon*, above cited, it was indeed held that the word "vegetables" might be subjected to evidence as to commercial usage, but it did not then appear, as it appears at present, that the word never is used in actual purchases and sales, which are always made under more specific names. If it had fully appeared in that record that the articles in question never were bought or sold either as vegetables or as seeds, and that the testimony of merchants as to the definitions of the latter terms were entirely theoretical, or, at the most, based upon the

arrangement of certain trade catalogues, it is difficult to believe that the judgment in the case cited would have been reversed by this court for the exclusion of such evidence.

We cite all of the other cases that we are able to find where evidence of commercial designation has been held admissible in this court (omitting the cases where it has been held inadmissible, and also some where remarks one way or the other were *obiter* only): *200 Chests of Tea*, 9 Wheaton, 430 (Bohea tea); *Barlow* v. *U. S.*, 7 Pet., 404 (refined sugar); *U. S.* v. *112 Casks of Sugar*, 8 Pet., 277 (sugar); *Elliott* v. *Swartwout*, 10 Pet., 137, and *Seeberger* v. *Cahn*, 137 U. S., 95 (distinction between wool and worsted); *Curtis* v. *Martin*, 3 How., 106 (cotton bagging); *Lawrence* v. *Allen*, 7 How., 785 (india-rubber shoes); *Arthur* v. *Cumming*, 91 U. S., 362 (burlaps and oilcloth foundations); *Tyng* v. *Grinnell*, 92 U. S., 467 (wrought-iron tubes); *Arthur* v. *Morrison*, 96 U. S., 108 (silk veils); *Arthur* v. *Lahey*, 96 U. S., 112 (thread laces); *Recknagel* v. *Murphy*, 102 U. S., 197 (crude argols); *Smith* v. *Field*, 105 U. S., 52, and *Meyerheim* v. *Robertson*, 144 U. S., 601 (thread lace and insertings); *Worthington* v. *Abbott*, 124 U. S., 434 (bar iron); *Arthur* v. *Butterfield*, 125 U. S., 70 (women's and children's dress goods); *Pickhardt* v. *Merritt*, 132 U. S., 252 (aniline dyes); *American Net and Twine Co.* v. *Worthington*, 141 U. S., 468 (gilling twine); *Robertson* v. *Salomon*, 144 U. S., 603 (gorings); *Earnshaw* v. *Cadwalader*, 145 U. S., 247 (iron ore); *Toplitz* v. *Hedden*, 146 U. S., 252 (bonnets); *Hedden* v. *Richard*, 149 U. S., 346 (furniture finished); *Cadwalader* v. *Zeh*, 151 U. S., 171, and *Mad-*

dock v. *Magone*, 152 U. S., 368 (toys); *Bogle* v. *Magone*, 152 U. S., 623 (sauces).

A few only of these cases need special mention. *Barlow* v. *United States* was a case in which there was no definition to appeal to other than a technical one. The question was whether the usage of refiners or that of trade should govern. The other sugar case concerned an article not known to consumers, and therefore requiring other solution. The question was whether chemists or commercial men should decide. *Tyng* v. *Grinnell* dealt with a distinction made by the tariff between a "tube" and a "flue," both being words used in actual commercial dealings. *Arthur* v. *Morrison* brought out the fact that in actual commercial dealings a distinction was observed between "silk" and "crape," although the latter is almost all silk (with some resin). *Earnshaw* v. *Cadwalader* was not strictly a case of commercial designation, but concerned the usages of trade as to the condition of iron ore when sold.

It is respectfully submitted that if such oral evidence as was admitted (though afterwards thrown out of consideration) by the trial judge in the case at bar were permitted to affect the language of the tariff laws it would become impossible to subject this matter of commercial designation to the salutary general rules relating to the proof of commercial usage which are laid down in *Maddock* v. *Magone* (152 U. S., 368) and *Berbecker* v. *Robertson* (152 U. S., 373). Such a usage should have no legislative force unless uniform, definite, and familiar; and this a "commercial designation" can not be unless it has really some *colloquial* existence among traders. For

the designation thus referred to is "the meaning which they have given to words and phrases *employed in their daily business.*" (*Recknagel* v. *Murphy, supra*, at p. 200.)

The moment it appears that the word "vegetables" is not used in the purchase of these beans—the moment it appears that that word is only a general heading in a trade catalogue—then the case falls within the rule of *Schmieder* v. *Barney* (113 U. S., 645) and of what the learned trial judge (p. 13) refers to as the "square-yard cases," that is, *Newman* v. *Arthur* (109 U. S., 132).

II.

The exceptions to exclusion of evidence with respect to commercial designation are untenable.

The questions are all in the present tense, referring to the usage of 1891 and not to the usage of 1883, and therefore irrelevant, as above shown. It is true that the record does not state this ground of objection as specifically taken. Still, it is not necessary that the record elaborate the grounds of objections in order to *sustain* the judgment. "The court will be presumed to have acted correctly until the contrary be established." (*Philadelphia, etc., R. R. Co.* v. *Stimpson*, 14 Pet., 448, 459.) "If evidence was properly rejected, it is of no importance here that an insufficient reason for rejecting it was given." (*Silsby* v. *Foote*, 14 How., 218.) Moreover, it affirmatively appears, as has been shown, that there was actually a different usage in 1883.

Moreover, questions to the same effect are answered elsewhere in the record (p. 14, top). Therefore, as the evidence excluded was merely cumulative and as the case

was not allowed to go to the jury, the plaintiffs could not possibly have been further harmed by the exclusion. (*Muser* v. *Magone*, 155 U. S., 240, 250; see also *Isaacs* v. *Jonas*, 148 U. S., 648, 652.) Hence we do not discuss these questions at length.

III.

The verdict was properly directed, on the ground that the court judicially knew the beans and lentils in question to be vegetables.

(*a*) Although beans are not specifically mentioned in the opinion in *Nix* v. *Hedden* (*supra*), nevertheless they are as much vegetables in common language as those enumerated by the court in that case; and at the close of its opinion the court assumed beans to have been already authoritatively classed as vegetables in *Robertson* v. *Salomon* (*supra*). String beans and other fresh beans are admitted by these plaintiffs to be vegetables. The English language, however, does not require greenness or freshness of a vegetable. As Mr. Justice Bradley said, in the case last cited, in words again repeated by the court in the Nix case, beans are used as vegetables, "whether baked, or boiled, or forming the basis of soup * * * as well when ripe as when green."

That the court judicially knows the meaning of the English language, and does not need the assistance of a jury to find out what a vegetable is, is held in the Nix case, as is fully set forth in the early part of this brief,

overruling the Salomon case to that extent. The same principle has been frequently asserted.

Thus in *Marrel* v. *Merritt* (116 U. S., 11) Mr. Justice Matthews said of the words "minerals and bituminous substances":

> They are the words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law.

In *Cadwalader* v. *Zeh* (151 U. S., 171, 179) Mr. Justice Gray said of certain testimony offered:

> Upon the question of the ordinary meaning of the word "toys" it was irrelevant.

In *Saltonstall* v. *Wiebusch* (156 U. S., 601) Mr. Justice Brown said of the word "forgings" (in the absence of any testimony as to commercial designation):

> We are bound to presume that it was used in its ordinary and commonly accepted sense of metal shaped by heating and hammering. * * * Of this use of words the court takes judicial notice.

It is respectfully submitted that the learned counsel for plaintiffs is in error as to the jury's function in construing a statute. The jury comes in only when there is conflicting evidence on some outside question, like trade usage, or "chief use."

That (when there is no issue of fact to be settled, such as one of those just instanced) the question whether a given article, whose character appears from uncontradicted evidence, is to be classified under this or that general term in the schedules is a question for the court to determine, is shown by an immense mass of authority. Confining ourselves to the cases disposed of at the last

two terms of court, we may instance *Hedden* v. *Robertson* (151 U. S., 520), *Berbecker* v. *Robertson* (152 U. S., 373), *Herrman* v. *Robertson* (152 U. S., 521), *Lutz* v. *Magone* (153 U. S., 105), *Saltonstall* v. *Wiebusch* (156 U. S., 601), *Cooper* v. *Dobson* (157 U. S., 148).

The cases in which it was held that a verdict should not be directed were where, before the meaning of the statute could be known, it was necessary to learn from conflicting evidence the controling use of the article in question (*Magone* v. *Heller*, 150 U. S., 70), or its similitude to some other article (*Erhardt* v. *Steinhardt*, 153 U. S., 177), or the values of its component materials (*Seeberger* v. *Hardy*, 150 U. S., 420), or its weight and fineness (*Erhardt* v. *Schroeder*, 155 U. S., 124), or whether labor was necessary to fit it for use by the consumer (*Spalding* v. *Castro*, 153 U. S., 38), or its commercial designation. (*Cadwalader* v. *Zeh*, 151 U. S., 171; *Maddock* v. *Magone*, 152 U. S., 368; *Bogle* v. *Magone*, 152 U. S., 623.)

(*b*) Furthermore it is submitted that the word "seeds" in the free list is shown by the words with which it is there joined to be intended as including only seeds used for seeding purposes. The word is joined in the free list not with any articles of food, but with "plants, trees, shrubs, and vines." The apparent object of this paragraph of the free list is to encourage the extension and improvement of our agriculture, horticulture, and arboriculture by free admission of the necessary material, whether for seeding or for transplanting. They are put on the free list for the same reason as "substances

expressly used for manure." (See *Magone* v. *Heller*, 150 U. S., 70.)

For this reason, apparently, the plaintiff endeavored to show that part of the beans imported by him were *actually afterwards* used for seeding purposes, and also that this was one, although admittedly the lesser, of the ordinary uses of such articles. *Occasional* use, when not the *chief* use, however, can not be made a test in our tariff legislation. The "hat trimmings cases," which have gone the furthest in this direction, make "chief use" the test, not occasional use or actual subsequent use. (*Hartranft* v. *Langfeld*, 125 U. S., 128, 134–135.) The *actual* use of imported articles by the person who purchases them from the importer can not in any case be made the test if the statute will reasonably bear any other construction. Such a test is a simple enough one to apply retrospectively upon a trial occurring long after the articles imported have passed into consumption. It is, however, entirely inconsistent with the due administration of the customs service. If subsequent actual use was the test the collector would always have to collect a higher duty, because he can not, of course, tell for certain how the article is going to be used. The importer may change his mind. (*United States* v. *Eleven Horses*, 30 Fed. Rep., 916.) Then, whenever each particular lot has been actually used up, a *quasi* judicial proceeding must be had before him to decide whether the use can be satisfactorily proved to have been such as to bring the article within the class paying the lower duty. If so, then the Government suffers a loss of interest on the amount of duty for the period in which the article is being used. A con-

struction postponing the determination of the dutiable value of an article until, perhaps, years after its arrival in the country, is unreasonable and absurd, and therefore plainly inadmissible within the authorities. (*Gyger's Estate*, 65 Pa. St., 312, quoted in *Heydenfeldt* v. *Daney Gold Co.*, 93 U. S., 634, 638; *State* v. *Clark*, 29 N. J. Law, 96, 98–99, quoted in *Holy Trinity Church* v. *U. S.*, 143 U. S., 457, 460; *Arthur* v. *Butterfield*, 125 U. S., 70, 76; *U. S.* v. *Kirby*, 7 Wall., 482; *Oates* v. *National Bank*, 100 U. S., 239, 244; *Chew Heong* v. *U. S.*, 112 U. S., 536, 555; *Pierson* v. *People*, 79 N. Y., 424, 434; Endlich on Interpretation of Statutes, §§ 251–252, 264, 295.).

In *Worthington* v. *Robbins* (139 U. S., 337, 341) the Government attempted to apply the test of actual subsequent use to the phrase "watch materials." The court, however, speaking by Mr. Justice Blatchford, said that "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself in the condition in which it is imported. * * * The fact that the article in question was used in the manufacture of watches has no relation to the condition of the article as imported, but as to what, afterwards, the importer did with it." In *Magone* v. *Heller* (*supra*) the article in question was sulphate of potash, which plaintiff swore was actually afterwards used for manure. The circuit court on this ground held the article to be free of duty as a "substance expressly used for manure." The case was reversed by this court, the language of the statute being held to refer, not to actual subsequent use nor to the intention of the importer—not, in fact, to any

special purpose or history of the article imported—but to the ordinary use to which articles of the class imported are put.

IV.

The remaining exceptions to evidence are also untenable.

(*a*) They largely relate to the proper classification of the article, not in commercial language, but in the common vernacular. It is perhaps sufficient to say, as to the evidence admitted on this head, that it does no harm, as the case would be decided the same way without the evidence; and, as to the evidence excluded, that it all related to the time of trial, and not to the year 1883.

Nor, as we understand the scope of the decision in *Nix* v. *Hedden* (*supra*), can any exception to such evidence be sustained; for the principle there applied to dictionaries would be equally applicable to all other evidence as to the vernacular language. Such evidence, if admissible merely to aid the memory of the court, could be received or not at the court's pleasure. (See also *Willoughby* v. *Willoughby*, 1 T. R., 772; also 1 Greenleaf on Evidence, 15th ed., § 6, *note*, and cas. cit.) It certainly can not be admissible for consideration of the jury. Testimony which the court judicially knows to be true is unnecessary. That which the court judicially knows to be false has no place in a court of justice. In other words, what is judicially known can not be the subject of an issue of fact. (See *Louisville R. R. Co.* v. *Palmes*, 109 U. S., 244, 252; *Taylor* v. *Barclay*, 2 Sim., 213.) Moreover, expert evidence is not admissible as to matters of common knowledge, whether they be judicially noticeable by

the court or matters such as are left to the jury to decide upon their own experience of life. (*Milwaukee R. R. Co.* v. *Kellogg*, 94 U. S., 469, 472–473; *Connecticut Insurance Co.* v. *Lathrop*, 111 U. S., 612, 618; *Schmieder* v. *Barney*, 113 U. S., 645, 648; *Inland Coasting Co.* v. *Tolson*, 139 U. S., 551, 559–560; *Ferguson* v. *Hubbell*, 97 N. Y., 507, and cases collated by Earl, J.) It is submitted, therefore, that the remarks to the contrary in the former bean case were opposed to the weight of authority.

(*b*) There are some exceptions in the record to the admission of evidence relating to the use of the articles imported. It was, of course, necessary to inform the court as to this matter. The court could not tell by looking at the beans as they appear in the bags whether or not they were edible. They might, for aught the court knew, be of the nature of the inedible vegetables and seeds which are classed with barks, excrescences, dried insects, etc., in paragraphs 94 and 636 of the tariff act.

We can not conceive what the plaintiff's objection to this evidence may have been unless it was that it related to the period of the trial and not to the date of passage of the tariff act. (*Rossman* v. *Hedden*, 145 U. S., at p. 570.) A sufficient answer to such objection would be that it was not specifically pointed out. To *reverse* a judgment upon a ruling as to admission of evidence, the reason of the objection must be specifically stated and incorporated in the record. (*Burton* v. *Driggs*, 20 Wall., 125, 133; *Patrick* v. *Graham*, 132 U. S., 627; *District of Columbia* v. *Woodbury*, 136 U. S., 450, 462; *Toplitz* v. *Hedden*, 146 U. S., 252, 255.)

(*c*) The other exceptions in the record either are entirely frivolous or relate to the exclusion of merely cumulative matter.

For the above reasons it is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.

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FILED.
OCT 15 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 16.

HYMAN SONN ET AL., PLAINTIFFS IN ERROR,

against

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.

OBSERVATIONS IN REPLY TO THE GOVERNMENT BRIEF.

Perusal of the Government brief suggests these supplementary observations in behalf of plaintiffs in error:

The argument of the Government would seem to urge that the *Salomon* judgment was erroneously reversed, except that the reversal should have been based (as it was not) on such an interpretation of the phrase in the free list as will exempt from duty only the "seeds" *imported for propagation*. This the learned Assistant Attorney General claims to be the true construction of the statute, as well as the exclusive significance in law, in trade, and in common speech of

the noun "seeds" as used in the tariff. The plaintiffs in error resist this construction as unwarrantable, and controvert the alleged fact respecting such limitation of the common meaning and the trade meaning of the word "seeds."

NOTES.

A. The learned Assistant Attorney General declares (page 8, his brief) that the opinion in *Salomon vs. Robertson* (Reprint, p. 71) "lays down two propositions in respect to beans: First, that the question whether they are seeds or vegetables is *primarily* to be settled by their commercial designation; and, second, that if evidence of their commercial designation fails, witnesses may be called and examined to prove the common meaning of the words 'vegetable' and 'seed' in the vernacular." To this questionable syllabus we cannot subscribe. We should have preferred some change in his phraseology, so as to read: First, that upon the question whether they (beans) are seeds or vegetables, evidence of commercial usage may be received; and, second, witnesses may be examined to prove the common meaning of the words "vegetables" and "seeds" in commerce and in the vernacular.

But speculation upon such *abstract* propositions as may or may not be evolved from Mr. Justice Bradley's opinion is not as useful as to read from its text, as we do, that a new trial was awarded only (1) because evidence (cumulative) was excluded as to the common designation of beans as an article of food, and (2) because it was erroneous for the trial judge to charge that "the name bean has nothing to do with the question." This is the *concrete* of the decision. Nor did it allude at all to "lentils," which were not in that

suit, as mistakenly twice stated at page 4 of Government Brief.

As to what, if anything, in the opinion was *obiter* we need not discuss with the other side so long as he finds so much fault with it as to declare some of its remarks to be "opposed to the weight of authority." In any event plaintiffs below endeavored to conduct the trial of the case at bar on the lines laid down by that opinion, but the rulings excepted to, even though otherwise erroneous, are not, we submit, in all respects within those lines. Besides, nothing was decided here in the *Salomon* case that fails to harmonize with the present contentions of plaintiffs in error, and we leave it for the court to say whether the discomfort of the learned Assistant Attorney General justifies his observation on his page 10 that any part of that opinion "is to be regarded as overruled and of no present authority." It is sufficient that we agree that the present case is an open one here.

May we again quote him (page 13) because of an inaccuracy, possibly, however, of slight consequence except to correct it? He says, page 13, "if it had fully appeared in that (Salomon) record that the articles in question were never bought or sold either as vegetables or as seeds, * * * it is difficult to believe that the judgment in the case cited would have been reversed by this Court for the exclusion of such evidence"—*i. e.*, evidence of commercial usage; but we note (*a*) that it *did* appear that the articles were *called* beans; (*b*) and that "beans are not called vegetables for the purposes of commerce" (Salomon Reprint, p. 14); and (by defendant's witness) that (*c*) beans were not commercially regarded as seeds in the seed trade proper (*Ib.*, p. 21, fol. 52). We read, therefore, without the qualification, the Government's

statement, at page 13, that the Salomon case "held that the word 'vegetables' *might* be subjected to evidence as to commercial usage," and observe that such testimony respecting both seeds and vegetables was prohibited to the plaintiffs below in this case (see Plaintiffs' Main Brief, p. 47), although it was permitted to the defense. (*Ib.*, pp. 9, 13.)

In view of the unexpected attitude of the learned Assistant Attorney General that the Salomon decision is "to be regarded as overruled and of no present authority," etc. (Government Brief, p. 10), and that remarks in the opinion were "opposed to the weight of authority" (*Ib.*, p. 23), we are constrained to assign for error an exception that should have been mentioned under number 12 in our main brief at page 13, viz., the exception at record page 39, folio 64, where the defendant was permitted to ask what these articles when cooked and used upon the table were called by people generally. The objection interposed was obviously the same objection which this Court overruled in the Salomon case (see p. 5, Government Brief, and Salomon Reprint, p. 25), and if this Salomon ruling is bad law (as the learned Assistant Attorney General implies) and is now to be reversed, we may as well have the benefit of the exception;—for where the reasons for an objection are obvious they need not be detailed. As to the Government's concern about *Nix vs. Hedden, 149 U. S., 304*, see our *Main Brief, point VIII.* In that case (see its Record, pp. 10–12) the Government proved that the terms in question, "fruits" and "vegetables," did not have "any special meaning in trade and commerce in this country" different from that read from the dictionaries.

B. 1. How does it help the defense to assert (as at the head

of Government point III, p. 17) "that the court *judicially knew* the beans and lentils to be vegetables" as a ground to direct the verdict? The court certainly "judicially knew," what every intelligent person may observe, that the exhibited samples 3 and 4 (the beans and lentils in question) were seeds respectively of the bean plant and of the lentil plant. The court judicially recognized them at sight and without verbal description to be "seeds;" and if such knowledge is *per se* a ground of directing a verdict, why not direct that the articles are seeds and therefore are exempt, being only a portion of the vegetables themselves and therefore more particularly enumerated and provided for as "seeds" than as "vegetables in their natural state"?

2. Besides, argument based exclusively on "judicial knowledge" assumes that a judge will decide upon an *opinion* formed by himself without evidence. If there were a stipulation that he should try the cause, waiving a jury, he might go by his own opinion on the facts. As any *opinion* upon such a topic may not be received in evidence, even though the witness be an expert, or apparently better qualified to give one than the jurors, so a judicial opinion which is to control the conclusion of a fact—*e. g.*, as to whether an article be blue or yellow—may not properly be announced as a conclusion of law, but belongs to the domain of fact, to be ascertained and concluded by the jurors only. It is the same respecting the issue as to whether a commodity be seeds or vegetables.

3. Furthermore, it may be cautiously observed, every court does not judicially "know" lentils, even if they constitute the table dish of some exceptional constituencies:

most courts requiring *some* evidence to describe lentils; and, being described, they are found to be the dried matured *seed* of the plant lentil; and although termed "lentils" are indeed, the *bean* of the lentil, yet not commercially styled the *bean*, as coffee is not styled coffee-bean, except for particular purposes, even when the bean only is meant. The lentil issue, it is submitted, belonged to the jury.

C. The Government Brief declares (p. 22) "expert evidence" inadmissible as to matters of common knowledge," etc. Without acceding to this proposition it is only necessary to dispose of it by saying that "expert evidence" cannot fairly be said to have been offered by plaintiffs below. "Expert evidence," properly so termed, calls for a matter of *opinion* as distinguished from a statement of fact. The plaintiffs offered by the testimony of experienced men having opportunities of observation *to narrate the fact* of a usage common among merchants dealing with special classes of articles. Such testimony belongs to the domain of *fact* as distinguished from *opinion*, and therefore transgresses no rule applicable especially to expert evidence. To be valuable to a court or jury it should relate to the "common knowledge and observation" of those in trade rather than to "the common knowledge and observation" of circles having no experience with the commodities which are the subject of the inquiry. In this sense the remarks of Mr. Justice Bradley, upon which plaintiffs sought to conduct the trial below, may not be open to the criticism of the learned Assistant Attorney General (p. 23 of his brief), that they "were opposed to the weight of authority."

Such testimony as was offered or actually received should

not have been withdrawn from the jury, who should have been charged with proper instructions to consider its weight and effect; and not have it withheld from them, unless "of such a conclusive character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict returned in opposition to it" (*Phœnix Ins. Co. vs. Doster*, 106 *U. S.*, 30, 32). It is not "expert evidence" to describe the *varieties of the commodities* commercially observed in trade under the generic descriptions of "vegetables in their natural state" and "vegetables in the prepared state;" or to tell the class of articles included in trade nomenclature under the term "seeds;" or to describe exhibited samples of the imports in question. (See Main Brief, p. 47.) This was prohibited to the plaintiffs below.

Tariff phrases seldom, and not in this case, require "expert evidence." It is not the *opinion* of trade witnesses that is of value; but their experience and observation with reference to a trade fact or usage which they are expected to narrate, or it may be to refute. The rule is well stated by Earl, J., in the case cited by the Government Brief (p. 23), 97 N. Y., 517, that it is safer to rely on jurors "than upon the opinions of witnesses, however expert they might be."

D. The trouble with the Government contention at this point is that it regards tariff classifications as matters of law, instead of distinctions of fact to be arrived at in view of all the circumstances attending the mercantile practices connected with the importation and sale of the tariffed commodities. The learned Assistant Attorney General assumes in his brief (p. 18) that we are claiming some function of the jury in "construing a statute." No; it is only in *apply-*

ing a statute to be *construed* by the court in proper instructions to the jury as to how to weigh the evidence; and in a case, too, where the testimony respecting a given article is not, as he assumes, *un*contradicted. For instance, there is some unqualified testimony that the disputed articles are seeds in fact; the defense proved that the word "seeds" was used commercially (Rec., p. 31), and assumed to have proved that the articles were *not* seeds according to the trade usage. The importers contend to the contrary. Here is an issue in the proofs. The Government claims to have proven the articles to be vegetables in fact. This the plaintiffs deny, claiming to have proved them not to be vegetables either in fact or according to trade usage. Here is another issue. Separately considered, either issue might decide this case. The jurors have the selection of either issue; and may then decide either selected issue for themselves. Here there is no play for "construing the statute." The jurors may disbelieve some or all of the evidence, and may go upon their common knowledge; but the question of fact still remains exclusively for them as stated by Shipman, J. (Plaintiffs' Main Brief, p. 27), "If you believe from the testimony that vegetables are the edible roots or tops of plants as distinguished from their dried, matured seeds, then your verdict will be for plaintiffs."

In the cases cited at top of page 19 of Government Brief there was an absence of controverted testimony; and the decisions cited, it is submitted, in no sense contravene the propositions stated in point I of our main brief. They were cases of uncontradicted evidence to which the court applied the statute after construing it.

On the other hand, we need not take issue with the learned Assistant Attorney General in his proposition at page 18 (of his Brief) that "the jury comes in only when there is conflicting evidence of some outside question like trade usage or 'chief use:'" because in the case at bar we have just such an outside question, viz., whether "seeds" in the common parlance of trade and commerce is a term that is confined to articles that are used for planting and propagation, or whether that term also embraces articles having qualities that will enable them to be used and are capable of being used for planting; and this is just as decisive a question in the case at bar as the question of chief use was in the hat material cases he cites (page 20), or the question of similitude in the Steinhardt case he cites (page 19); or the question of values of component materials in the Hardy case (page 19); or of weight and fineness in the Schroeder case, or other elements in other cases that may be cited. It is certainly a much more distinct and separable question of fact, and as decisive of the issue at bar, as the question whether labor was necessary to fit tobacco for use by the consumer, that was submitted to the jury in the Castro case, cited by the Assistant Attorney General at page 19 of his brief.

E. True, in the case at bar there is a function of "*construing* a statute" to be performed, but by the court, *not* by the jury, viz., in disposing of the Government (Brief, p. 19) argument that the word "seeds" in the free list is to be *construed* to include "*only seeds used for seeding purposes.*" It would have been candid for the Government to have declared that *without* this construed interpolation in the statute, the free list in question would have necessarily included the plaintiffs' importations. The contention of the Government throughout the case depends on securing such a judicial limitation of the statutory language as will limit the seeds

(except medicinal), that were exempted from duty, to articles designated for propagation. Anticipating this necessity on the part of the learned Assistant Attorney General, we have met his argument at our pages 28 to 38 of Plaintiffs' Main Brief, to which we again invite attention, as well as to pages 51 to 55 of *Salomon Reprint;* reiterating the considerations there suggested only to observe here, that if this Court had judged it sound law to reinsert in the statute by judicial legislation the words "seeds for agricultural and horticultural purposes" or their equivalent, which words were in the prior tariff and were dropped from the tariff of 1883, after a special consideration by Congress of the effect of such phraseology, an expression of this Court's conclusion to that effect would surely have been found in the opinion of Mr. Justice Bradley. This Court has not so decided; and being now called upon by the Government to antagonize the Treasury Department decisions (Rec., fol. 85), that the "use as an article of food or for planting purposes does not control the question" of the classification, we submit with confidence the impropriety of the limitation now sought by the learned Assistant Attorney General to be imposed on the noun seeds in the free-list phrase in question.

Moreover, there is no seed commodity having value for purposes other than planting that is not in fact used more extensively for those other purposes than for purposes of propagation. In respect to such seeds their general use for purposes other than planting does not render them any the less seeds in point of fact. If the statute had contemplated that the *use* of seeds should control, it would have said so.

Without this judicial (and, as we insist, unwarrantable) limitation of the noun seeds to seeds for planting purposes,

we submit (1) that on the merits the plaintiffs' articles are inherently and incontrovertibly seeds, and therefore free, and (2) that the evidence *pro* and *con.* upon this point, even as introduced and claimed by the defendant, should have been submitted to the jury.

F. The true rule as stated by Blatchford, J., at *132 U. S., p. 257* (*Pickhardt vs. Merritt*), and never since questioned by this Court, is:

If the articles in question, according to the understanding of commercial men, dealers in and importers of them, would when imported be included in the class of articles known as aniline dyes (*i. e.*, in this case *seeds*), by whatever name known (*i. e.*, lentils, beans, kidney beans, marrow beans), they were subject to classification as aniline dyes (*i. e.*, in this case seeds).

Of course, if the articles in question were new to commerce and were not known to trade when the tariff in 1883 was enacted, a special class of questions might arise; but this is not the case nor is it so claimed by either side. The witnesses state their protracted experience of years before as well as after 1883, and speak of a uniform commercial knowledge that relates to their entire experience, unless the contrary appears, as it does not. Moreover, the existence of a custom being shown and no change indicated, the presumption is that the custom was continuous, unless the contrary appears or some change shown necessitating location of the dates of the changes. It is only a usage well established and generally known, as well as reasonable and certain, that affects the language of statutes, and even this may be shown by a single witness having full knowledge

and a long experience (such as the witnesses Wakeman, Carr, and Roeker) on the subject of which he speaks, so long as the usage is not contrary to law and is consistent with the statute sought to be affected by it. Besides, all the questions and answers in the case at bar were directed to the entire time covered by the experience of the witness in hand, and no point was made at the trial that the words "1883" should have been inserted in the form of every question. The suggestion (Government Brief, p. 12) that this is a case where usage "varies with the tariff" rates is quite gratuitous and unsustained by the record. Nobody disputes that the classification of a dutiable article is to be determined as of the date when the law imposing duty was passed (145 U. S., 561); and that proofs of a usage enduring today for a generation past are unobjectionable in respect to date until cause is shown to the contrary. uniformity. Ac.

Besides, the record is explicit in establishing, as one witness phrases it, in answer to the court's inquiry of him whether in this case "*the terminology is about the same* now as in 1883," and the answer was, "Yes; *there is no difference between the names in 1883 and the present time.*" (Rec., p. 27, fol. 45.)

G. Furthermore, the attempt to set up any alleged variation with respect to dates cannot fairly be assigned to plaintiffs in error, who made no claim to any special trade usages not harmonizing *at all times* with the ordinary speech of our English vernacular.

The trade usages and the vernacular to be advised upon concern the commodities of import *as imported*, not as cooked and designated when served at table; and to ascer-

tain whether the articles in question are recognized among commercial men as among those styled "seeds;" not *individually named* seeds, because every seed has its own name, and the designation "seeds" does not individualize any particular commodity; what commodities does it habitually include—*i. e.*, among well-informed men and among traders? All this may be shown (see *Bogle vs. Magone, Plff's' Main Brief, p. 46*); but, if divergence appears, and any claim is based thereon, the evidence must be clear and exact before the court will give it any significance whatever as against the common meaning of English phraseology; but no such significance is claimed by plaintiffs in error. The record will be searched in vain for any effort of plaintiffs to establish trade customs inharmonious with our common knowledge; but proofs as to what commodities in commerce are recognized to be among the "*seeds*" and the "vegetables" *in the condition when imported and dealt in* and then subject to the application of the revenue laws, do not come within any prohibited zone prescribed by this Court in any of the cases cited by the learned Assistant Attorney General, or that can be cited.

Nor does it make any difference whether beans and lentils are *dried* vegetables. All seeds, *if really "seeds,"* are dried, and *if* "seeds" they are so classifiable, whether dried vegetables or not, the *part*, the matured seed, being more specific than the whole. Of course, there is a distinction between "green" and "dried," as the words imply; but what of it? Nobody has claimed that that circumstance cuts any figure in this controversy.

Nor is the bill of fare or the table vocabulary an accepted tariff standard. It hurts nobody to *tell* about it, and (as

this Court said in Mr. Justice Bradley's opinion) "that does not solve the question" between the rival tariff designations of seeds and vegetables. Imagine the *menu* of the *chef* as an explanatory Tariff-Assistant—a sort of Tariff Concordance, as it were—issued by the Treasury Department as a guide to customs officers! Oral, or in the *lex scripta*, it may have dignity as well as mystery; but after all it is only a digestive circumstance. Speaking juridically (*Salomon*), it may "come in" at the trial; and that is all there is of it.

Indeed, in the Salomon case the very question there excluded (Reprint, p. 25) had already been fully answered (*ib.*, p. 24), and doubtless would not have caused reversal of the case, had it not been for the slip of the trial judge in the single sentence in his charge that was selected as ground for reversal;—a sentence, indeed, that if permitted to be explained by its context might be deemed to harmonize with the law. The remainder of the charge was tacitly approved by this Court; and, as we contend (Plaintiffs' Main Brief, p. 27), should have been followed in the trial below of the case at bar.

H. The learned Assistant Attorney General (see Brief, pp. 10 and 11) alleges the absence of evidence tending to show that the word vegetables "failed to include edible beans of any kind." Suppose it be so; what of it? Undoubtedly vegetables are often edible beans of some sort. Even these seeds, being one kind of edible beans may, in some senses, be vegetables and yet be classifiable for revenue purposes as seeds under the tariff, being thus more particularly enumerated and provided for. This is the point in the case which is necessarily shunned by the Government counsel, and,

as we submit, is nowhere attempted to be answered except by limiting seeds to articles used only for planting, which is, as we claim, an unjustifiable and impracticable limitation.

I. Irrespective of any exceptions to the rejection or admission of evidence, upon the record, as the testimony there stands, there were issues of fact belonging to the jury (see our Main Brief, p. 48), and there is nothing in that brief that we cannot still rely upon as anticipating and answering the learned Assistant Attorney General.

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In Behalf of Plaintiffs in Error.